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LATIN PHRASES AND MAXIMS.

Rob. Archibald

LATIN PHRASES AND MAXIMS:

COLLECTED

FROM THE INSTITUTIONAL AND OTHER WRITERS ON SCOTCH LAW;

WITH

TRANSLATIONS AND ILLUSTRATIONS.

BY

JOHN TRAYNER, ESQ.,

ADVOCATE.

EDINBURGH:
WILLIAM PATERSON, 74 PRINCES STREET.

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JUN 6 1911

PREFACE.

The present work was undertaken on the suggestion of the publisher, who judged, from the frequent applications made to him for a work of a somewhat similar character, that it would be both useful and acceptable.

There has been no previous work similar to the present, except one which is limited to a translation and explanation of the latin phrases to be found in Erskine's Institutes of the Law of Scotland. As there are many maxims and phrases in common use among lawyers which do not appear on the pages of that writer, it was deemed expedient to give a more comprehensive collection; and it is thought that in the present work the most, if not all, of the usual and ordinary latin phrases will be found.

My chief aim has been to combine correctness of statement with clearness of expression; and to this end I have endeavoured to offer the most intelligible explanation of the maxims and phrases, and to give the most apposite illustrations of their meaning and application. I trust, therefore, that the present work may not be without value to students and others, in assisting them to acquire a knowledge of the

technical import and application of those law maxims and phrases, which, in very many cases, cannot be acquired by a mere knowledge of classical latin.

I would have had less confidence in the correctness of the different opinions and statements here advanced, had they not been subjected to the revision of others on whose judgment every reliance can be placed. I am indebted to Professor Swinton for revising a portion of the work, and to my friend Sheriff Hallard for revising the whole; and to both these gentlemen I have to offer my best thanks for the trouble so kindly undertaken by them on my behalf.

5 ALBANY STREET,
EDINBURGH, 18*th November* 1861.

LIST OF WORKS REFERRED TO, WITH NOTE OF THE ABBREVIATIONS USED.

Stair	Stair's Institutions of the Law of Scotland, edited by Brodie.
Ersk.	Erskine's Institutes of the Law of Scotland, edited by Lord Ivory.
Hume	Hume's Commentaries on the Law of Scotland respecting Crimes, with Notes by Bell.
Bell's Prin. . . .	Bell's Principles of the Law of Scotland, 4th Ed.
Bell's Com. . . .	Bell's Commentaries, 5th Ed.
Duff's Feud. Con. .	Duff's Treatise on Feudal Conveyancing.
Menzies' Lectures .	The Lectures of the late Professor Menzies, 1st Ed.
Fraser's Dom. Rel.	Fraser on the Domestic Relations.
Taylor	Taylor on Evidence, 3d Ed.
Dickson	Dickson on Evidence.
Ersk. Prin. . . .	Erskine's Principles of the Law of Scotland, edited by Smith.
Tilsley	Tilsley on the Stamp Laws.
Paterson's Compend.	Paterson's Compendium of English and Scotch Law.
Bell's Dict. . . .	Bell's Law Dictionary.
Just. Inst. . . .	Institutes of Justinian.
Sandars' Justinian .	Institutes of Justinian, with Translation, Notes, &c., by Sandars, 1st Ed.
Dig.	Digest or Pandects.
C.	Code.
Smith's Dict. . .	Smith's Dictionary of Greek and Roman Antiquities, 2d Ed.

LIST OF REPORTS REFERRED TO.

M.	Morrison's Dictionary.
F. C.	Faculty Collection.
S.	Shaw, and Shaw and Dunlop, down to 1838.
D.	Dunlop, and Session Cases from 1838.
Broun Swinton Irvine . . .	Justiciary Reports.
Dow	Dow's Reports of Decisions on Appeal in the House of Lords.
W. & S.	Wilson & Shaw's House of Lords' Reports.
Macq.	Macqueen's House of Lords' Reports.

ERRATA.

Page 47 *line* 14, *for* "T. 5," *read* T. 25.
„ 52 „ 4, „ "19th," „ 17th.
„ 59 „ 24, „ "teneat," „ tenet.
„ 66 „ 26, „ "cap. 20," „ cap. 60.
„ 134 „ 1, „ "cap. 8," „ cap. 18.
„ 147 „ 24, „ "1858," „ 1856.
„ 184 „ 11, „ "cap. 5," „ cap. 35.
„ 194 „ 15, „ "L. 42," „ L. 41.
„ 197 „ 22, „ "œstatem," *read* ætatem.

LATIN PHRASES,

WITH

TRANSLATIONS AND ILLUSTRATIONS.

A

A cœlo usque ad centrum.—From the heavens to the centre of the earth. This phrase is used to denote the extent of the right of a proprietor of land, who, on his feudal investiture in the land, becomes entitled to everything pertinent or belonging to it, whether above or below ground, such as houses, trees, minerals, &c. It includes also the proprietor's power of using his property as he may think fit, and preventing any other person encroaching thereon, above or below the surface. He may erect any kind of building on it, and to any height, or he may work the minerals to any depth.

A contrario sensu.—Literally, in the opposite sense or view; equivalent to the common expression, on the other hand. (Stair, B. 4, T. 50, § 10).

A fortiori.—By a stronger argument; so much the more.

A jure suo cadunt.—They fall from (or lose) their right. This refers to the loss of right in a subject, by loss of possession or abandonment. When property has in this way passed from the right of the last possessor, it is confiscated as caduciary, and belongs to the Crown, or others deriving right therefrom, and does not, as in the case of subjects never before appropriated, become the property of the finder or first subsequent possessor. "Things already appropriated, but lost, forgotten, or abandoned, fall under a different rule from that which regulates things that have never been appropriated. The rule is *quod nullius est fit domini regis.*" (Bell's Prin., § 1291.) Wrecks, prizes taken in war, treasure-

trove, and waif and stray goods, all fall to the Crown as caduciary. See *Res nullius.*

A libello ut libellatur.—From the libel as laid. The terms used long ago in interlocutors of the court, dismissing an action, and pronouncing decree of absolvitor in favour of a defender.

A me de superiore meo.—From me, of my superior. This forms that part, or clause of a conveyance of lands, which indicates the nature of the tenure by which they are to be held, and whereby it is declared, that when the feudal title is completed the grantee is to hold of the granter's superior. This is commonly known as an *a me* holding as opposed to a holding *de me.* The former (*a me*) is now called a public holding, while the latter (*de me*) is termed, base. These significations did not always attach to the respective phrases; and it may not be out of place to notice here very briefly how the change occurred. Originally all lands in Scotland were held directly of the Crown Prince. He was the immediate superior of the lands, and the barons to whom the lands were gifted were his vassals. Their holding was *de me,* and necessarily so, because they could hold of no higher superior, and this, therefore, was originally the nobler of the two holdings. But when the crown lands were, for the most part, gifted, and the barons in their turn began to give grants of land to their followers, the character of the tenures in this respect underwent a change. A *de me* holding from a baron was a holding permanently subordinate to him and his successors, while the holding *a me* enabled the disponee or grantee, to whom lands were conveyed on that tenure, to pass over the baron, and, by resignation, obtain an entry with the Crown, whereby the grantee became a Crown vassal, holding directly of the Crown, without any interjected subject superior. Thus the *de me* holding, originally the nobler, became the baser, while the *a me* holding, formerly the baser, became the public, and the nobler holding of the two. The *a me* holding being one of the superior of the disponer, the disponee must enter with that superior before his feudal title can be made complete. This, formerly, could only be done in the one way, namely, by resignation *in favorem,* as the superior was not bound to enter a singular successor as his vassal

by confirmation. Notwithstanding this, the practice of entering vassals by confirmation is a very old one; and as entry by this mode had become a matter of daily practice, it was rendered obligatory on superiors so to enter vassals by the Transference of Lands Act (10 and 11 Vict., cap. 48). The holding most frequently to be found in practice is the alternative one, *a me vel de me*. On this, the disponee could formerly either infeft as the disponer's vassal, and thus save an entry with the superior, or, by resignation or confirmation, enter at once with the over superior. The former course was most frequently followed, as subsequent confirmation acted *retro*, and had the effect, in the event of a competition, of making a holding, originally base, a public one, as from the date of the infeftment on the *de me* precept. The effect, practically, of such procedure was, to save the expense of an entry, while the holding could be rendered public and indefeasible at any time by confirmation.

A mensa et toro.—From bed and board. This is a judicial separation of husband and wife, which the wife may obtain on the ground of cruelty, &c. It puts an end to the husband's powers over the wife's person, but does not otherwise interfere with his marital rights. Until very lately, it was the only kind of separation granted by the law courts of England, a divorce *a vinculo* not being obtainable, except under an Act of Parliament. This is now altered, and the law of England has become almost the same as that of Scotland on this point. A separation *a mensa et toro* may be the result of a voluntary contract between the parties.

A morte testatoris.—From the death of the testator. A legacy or bequest does not vest in the legatee or beneficiary until this event takes place; and therefore, where the legatee predeceases the testator, if there be no provision to the contrary, the legacy lapses, and the legatee's successor takes no benefit under the bequest. The phrase is used to distinguish between those rights under a settlement which vest upon the death of the testator, and those of which the vesting is postponed to a later period.

A non domino.—From one who is not the proprietor. A conveyance by such an one, with infeftment thereon, and consequent possession, and acts of ownership for forty years,

renders the possessor's title unassailable, except on the ground of falsehood, Act 1617, cap. 12. Within the prescriptive period, the objection that the title proceeded *a non domino*, is fatal.

A non habente potestatem.—From one not having power. This is akin to the preceding phrase, and may be illustrated by reference to a practice in conveyancing often resorted to, because simple, and as a means of saving expense. If A. dispones ground, which he holds on a personal title, to B., he cannot grant warrant for the infeftment of B., himself being uninfeft; but he can assign to B. the unexecuted precept of sasine in his (A.'s) own favour, and on it B. can complete his feudal title. If, instead of thus assigning a valid precept, A. himself grants a precept for the infeftment of B., such a precept is *a non habente potestatem*, and ineffectual. This is a defect, however, which as we have seen, is remedied by prescription.

A pari.—Equally; in like manner. (Stair, B. 2, T. 2, § 12).

A quo invito aliquid exigi potest.—From whom something may be exacted against his will. This is given by Erskine (B. 3, T. 1, § 5) as a definition of a debtor in a perfect obligation. In obligations merely natural, fulfilment is voluntary; a civil obligation, being "that tie of positive law by which one is bound without any foundation in equity," although founding action, may be successfully resisted on many grounds, as, for instance, fraud; but mixed obligations, where law and equity combine, are prestable, and fulfilment may be enforced, whether the obligant is willing to fulfil or not.

A rubro ad nigrum.—Literally, from the red to the black. Acts of Parliament formerly had their titles printed in red, which thus obtained the name of "rubrics"; and this phrase means that the rubric, as a part of the statute, may be considered in construing the Act itself: "Where the title of a statute is either framed by the legislature itself, or hath received its tacit approbation in any succeeding enactment, it ought to be accounted part of the statute; and of course an argument may be properly drawn, in that case, *a rubro ad nigrum*, from the title to the Act itself."—Ersk., B. 1, T. 1, § 49.

A vinculo matrimonii.—From the bond of marriage. A divorce *a vinculo* sets the parties as free from each other as if they had never been married, and entitles each to marry

again, even during the lifetime of the previous spouse. A separation *a mensa et toro* has not this effect. See *A mensa.*

Ab agendo.—From acting. A person is said to be *ab agendo* when incapacitated from business, or transactions of any kind, through old age, mental weakness, or any other cause.

Ab inconveniente.—From inconvenience. In certain cases an argument *ab inconveniente* has great weight, and such an argument generally arises in questions of construction, either of a private writ or of an Act of Parliament. If in a private deed (as, for example, a deed of settlement) there be equivocal expressions, and great inconvenience must necessarily follow from one construction of them, this will go far to show that such a construction is not according to the true intention or meaning of the granter. In like manner, in construing Acts of Parliament, if the meaning of it be doubtful, that construction will not be regarded as the right one, which will occasion great inconvenience in carrying out its provisions, if it will bear another construction not liable to this objection. But if the terms of the deed or of the statute be plain, having a necessary meaning, it must bear that construction, and that construction only, whatever may be the inconvenience arising from such a course.

Ab initio.—From the beginning.

Ab intestato.—From a person dying intestate. The property of any one dying without disposing of it by a valid deed, is distributed, according to certain fixed legal rules; and property so acquired is said to be derived *ab intestato.*

Absque ipsius regis speciali licentia.—Without the special authority of the King himself. This forms part of an enactment passed in the reign of David II., cap. 24, which prohibited the Crown vassals from alienating their lands without first having obtained such special warrant for doing so. A subsequent statute (Robert III., c. 19) declared such alienations, without previous license, to be a ground of recognition, or forfeiture of the fee.

Acceptilatio.—A mode, under the civil law, of extinguishing a verbal obligation. It consisted in the creditor declaring, in the prescribed form of words, that he had received from his debtor that which was due, when in reality he had received nothing. It was the form adopted by a creditor who

wished gratuitously to release the debtor from his obligation. The same name is given to a gratuitous discharge in our law. (Ersk., B. III., T. 4, § 8.) See *Stipulatio.*

Accessorium principale sequitur.—An accessory follows the principal to which it is an accessory. Where two things stand in such intimate connection, that the one depends upon, or is derived from the other, the accessory belongs to him who has right to the principal subject. So the proprietor of land is, on this principle, also the proprietor of any buildings erected on it, and of the fruits it yields (there being an exception in certain cases as regards industrial fruits); the owner of vested capital has right to its interest and profits; and the owner of cattle to their offspring. The same principle applies to accessory obligations, as, for example, to cautionry. The cautioner's obligation being accessory to that of the principal debtor, is discharged on the extinction, in whatever way, of the principal obligation.

Accessorium sequitur naturam rei cui accedit.—An accessory follows the nature (or, acquires the character) of the subject or right to which it accedes. Erskine illustrates this by quoting a case where "one who had, in security of a purchase of lands, acquired right to the escheat of the seller, was not allowed to ascribe his possession to the gift of escheat, but was obliged to apply it to the minute of sale, because that was the principal and the sovereign right." (B. II., T. 1, § 30). The right, as donee of the Crown in the escheat, became thus a mere corroboration, and partook of the character of the antecedent singular title. A farther illustration may be taken from the case, where an additional moveable security is taken for a debt already heritably secured. The taking of the movable security does not make the debt moveable, but, being an accessory, would partake of the nature of its principal, and would consequently, in a question of succession, descend to the heir, and not to the executor.

Accidentalia.—Accidents of a contract, in opposition to the *essentialia*,—essential parts of it; as in a contract of sale the right of pre-emption may be added, which is an accident of the contract; but the agreed-on price is an essential of it. There may be a contract of sale without the former, but there cannot be such a contract without the latter.

Accidentalia feudi.—"All provisions in the feudal contract, which are neither of the essence, nor of the nature of a feu." (Ersk., B. II., T. 3, § 11). Such, for example, as the condition, that within a certain period subjects of a fixed value shall be erected on the land feued, or conditions restrictive of building.

Accipe ecclesiam.—Receive this church, or living. The form of words sometimes used by a patron in presenting an incumbent to a vacant cure. *Trado tibi ecclesiam* (I deliver the living or church to you) was also a form of expression sometimes used.

Accusatio suspecti tutoris.—Accusation of a suspected tutor. This was an action under the civil law against a tutor, arising out of certain circumstances. If he was unfaithful in performing his duties, such as failing to have alimony decreed to the pupil, or was of bad character, he might be removed from his office as *suspectus*, on an application to the Prætor, at the instance of any citizen. Such an application with us can only be made to the Court by one of the minors or pupils next of kin, or by a co-tutor or co-curator of the *suspectus*. By the Pupil's Protection Act (12 and 13 Vict., cap. 51), it is made competent to the Lord Advocate, where he has reasonable grounds for suspecting "malversation or misconduct on the part of" the tutor, to apply to the Court for his removal.

Acquisita et acquirenda.—Things acquired, and to be acquired. Some forms of diligence affect both these classes of subjects, while others only affect the *acquisita*. Arrestment only attaches what is acquired or due at the time of its being used, while inhibition affects both subjects acquired at the time of inhibiting, and those acquired subsequently, so long as the inhibition remains undischarged. In like manner, the adjudication of a bankrupt's estate to his trustee affects both, and operates like an inhibition, until the bankrupt be discharged and reinvested.

Actio.—An action; that is, the means which one person employs for obtaining, from a properly authorised judge, a sentence upon some other person, ordaining him to fulfil some obligation under which he lies. The various kinds of action under the civil law were numerous and complicated. They arose from

four chief sources, namely, contracts, quasi-contracts, delicts, and quasi-delicts, each of which had several divisions and subdivisions; and the modes of procedure in raising and prosecuting these actions were different, at different periods in the history of the Roman law. Some actions were private and personal, which could only be raised by the person having interest, such as the action *ex stipulatu* (arising from a stipulation or verbal contract); while others were popular, and could be sued by any citizen. The latter were regarded as affecting the public interest, and therefore could be raised by any one; as, for example, the *accusatio suspecti tutoris*. Some contracts gave rise to two different actions, which were respectively termed *directa* and *contraria*, the former being that which arose directly and necessarily from the contract, and the latter being an action not necessarily arising, but which had arisen from circumstances attendant upon the contract, and in connection with its fulfilment. To illustrate the character of these counter actions, take the contract of deposit, under which the depositary received something belonging to the depositor, to be kept by him, and restored when the depositor required delivery. The contract gave rise to an action at the instance of the depositor, to enforce delivery of the subject deposited, and this was called the *actio directa depositi;* and it might also give rise, although not necessarily so, to another action. If the depositary had expended any sum in the preservation of the deposit; if he had been at the expense of nourishing it, as in the case of a living deposit, cattle, &c., or had incurred damage through the deposit having been made, upon all or any of these grounds an action arose at his instance against the depositor for reimbursement of the sums expended, or for indemnification on account of the damage sustained. Such action was called the *actio contraria depositi*. The right of the depositor to the redelivery of the subject being an essential part of the contract, it gave rise to the *actio directa;* but the *actio contraria* arose from circumstances not essential to the contract, and circumstances which might never have arisen. It would be irrelevant to the purpose of this work to enumerate and explain all the different actions under the Roman law, but such of them as have been referred to by the institutional writers on

Scotch law will now be adverted to. And first, may be noticed five different *classes* of actions, viz.—

ACTIONES BONÆ FIDEI.—Actions of good faith. This term was applied to these actions in which the judge was entitled to decide, not simply according to the strict civil law, but according to equity or good faith, and under this class fell actions arising from the contracts of sale, location, partnership deposit, pledge, &c. Actions of good faith were opposed to

ACTIONES STRICTI JURIS.—Actions of strict law, where the judge could only regard the strict terms of the contract and decide according to the rules of law affecting it, without regarding the equity of the question at issue.

ACTIONES POPULARES.—Popular or public actions. This class of actions has already been alluded to. They arose out of circumstances affecting the public interest or welfare, and could be raised and prosecuted by any citizen.

ACTIONES REI PERSECUTORIAE.—Actions for the recovery of something belonging to the pursuer of the action. These actions were used where the pursuer had a right to, and insisted on delivery being made to him of the *ipsum corpus* of the subject sought; but they were also used for the recovery of something *due* to the pursuer. *Actiones in rem*, were chiefly for recovery of the *ipsum corpus*, and arose from a *jus in re*, although they might also include a demand for indemnity or penalty.

ACTIONES PENALES.—Penal actions, or actions having penal conclusions. Under these actions the pursuer not only sought for the fulfilment of some obligation incumbent on the defender, but also for a pecuniary penalty, on account of its nonfulfilment. The action competent against a vicious intromitter, was of this class, as he was bound not only to make good to a just claimant, what he had acquired though his intromission, but was bound for the whole debts of the deceased, with whose effects he had intromitted, even where these were not of value equivalent to the debt. The same action is applicable in our law to the recovery of violent profits from a possessor in *mala fide*.

We proceed now to notice such of the particular actions of the Roman Law, as are referred to by Scotch institutional writers.

ACTIO COMMODATI.—The action arising from the contract of commodate,—a contract under which one person gratuitously lent to another a certain subject, the borrower undertaking to return it to the lender when the purpose for which it had been lent was accomplished. This contract gave rise both to the *actio directa* and *contraria*, the former being that by which the lender enforced the redelivery of the subject lent, and the latter being the action competent to the borrower for the recovery of any extraordinary expenses required to be outlaid on the preservation of the subject.

ACTIO COMMUNI DIVIDUNDO.—An action for the division of a subject held by several proprietors in joint property. When one of the joint proprietors gathered the fruits of the subject, he was bound to account for them to the others, who, in their turn, were bound to relieve him of a share of the expense of management. These obligations gave rise to this action, which is similar in principle to that known in Scotland as an action of division of commonty.

ACTIO CURATELÆ.—See *Actio tutelæ*.

ACTIO EMPTI.—This action, as well as the *actio venditi*, arose from the contract of sale, and were both *actiones directæ*. The *actio venditi*, competent to the seller, was the action by which he recovered payment of the stipulated price. The *actio empti* was that competent to the purchaser. Under it he could compel delivery of the subject sold, or where the subject was *extra commercium*, and could not be delivered, could obtain indemnification for any damage he had sustained. These actions are sometimes called *ex empto*, and *ex vendito*.

ACTIO EXERCITORIA.—See *Actio institoria*.

ACTIO EXPILATÆ HÆREDITATIS.—An action for recovering the penalties of a pillaged heritage or succession. This action, among the Romans, was nearly equivalent to the action in Scotch law against a vitious intromitter. Any one who took away, without right or authority to

do so, any part of the succession or estate, was held guilty of the *crimen expilatæ hæreditatis*, which was regarded as theft. This action could be brought against almost every person guilty of the *crimen*, but it could not be brought against the widow of the deceased whose estate was pillaged. The punishment attached to this crime was reckoned *extraordinaria*, and was in the discretion of the Judge who decided the case; like all thefts, however, the sentence in this action inferred infamy.

ACTIO FAMILIÆ ERCISCUNDÆ.—An action under which the succession (*hæreditas*) was divided among the heirs. This action only differed from that *communi dividundo*, in respect of the peculiar character of the subject divided.

ACTIO FINIUM REGUNDORUM.—An action for fixing the boundaries of adjoining lands. This action was competent to either proprietor when the land marks had been fraudulently removed, or if they had decayed, and the judge was entitled to mark out the boundaries, when he had ascertained that his intervention was necessary. In fixing the boundaries, the judge was invested with considerable discretionary power, and could for the purpose of making the boundary more clear, adjudge part of the land belonging to one, to belong to the other, sentencing the latter to pay the former the price of land so adjudged, which price the judge himself fixed. The effect of such adjudication was to transfer immediately the property to the person in whose favour it was made. Sheriffs, and other judges-ordinary in Scotland, are vested with a somewhat similar power. By the Act 1669, cap. 17, they are authorised, "where a landholder proposes to inclose any part of his grounds, to appoint, at his suit, a visitation of the marches between him and the adjacent proprietors; and where they are crooked, or otherwise improper for a fence, to adjudge such part of the grounds as occasion the inconveniency, from one proprietor to the other, for grounds of equal value, so that the fence to be made, according to that adjudication, shall be reputed the common march for the future. This power is not limited by the intendment of the statute

to small parcels of ground, but reaches to that quantity which produces the inconveniency, though it should amount to several acres." (Ersk., B. I., T. 4, § 3.) This proceeding is known in our law as the straighting of marches.

ACTIO INSTITORIA.—An action against a master or a father who had respectively given a slave, or a child *sub potestate* charge of a certain business, to enforce liabilities incurred by the slave or child in reference to the business which each had been appointed to conduct. There is a similar ground of action in our law. A husband is liable for the obligations incurred by a wife in a business in which he has placed her, or which she superintends with his acquiescence; a principal is bound by the acts of his agent, where they do not exceed the ordinary powers of such an agent, and "the person who has the management of a shop has a presumed general authority to bind his principal by his proper acts of administration as shop-keeper,"—(Bell's Prin., § 231.) The *actio exercitoria* is of a like character, but refers only to the acts of a ship-master, which are binding upon the ship-owner. These actions derive their names from the person charged with the management of a business being called *institor*, and the person to whom the ship's daily profits belong being called *exercitor*.—(Just. Inst., B. 4, T. 7, § 2.)

ACTIO PAULIANA.—This was an action given to creditors by which they could recover property alienated by their debtor in fraud of their rights, and was competent against persons acquiring the property by a title importing clear gain, but not against a purchaser for a valuable consideration, unless he was aware of the fraud. This action could either be brought as a real action, for recovery of the property itself, or as a personal action for its value, the former proceeding upon the fiction that the property had never been duly delivered, and had, therefore, always remained among the goods of the debtor, into possession of which the creditors had been put. This action acquired its name from the Prætor Paulus who introduced it.

ACTIO PIGNERATITIA.—This arose out of the contract of

pledge, and was either *directa* or *contraria*. The action *directa* was at the instance of the debtor who had pledged the subject, against the creditor with whom it was pledged, to compel restoration of the pledge after the debt was discharged in security for which it had been given; or, to compel the creditor to pay over the balance in his hands after deduction of his debt, if in virtue of his right he had sold the pledge. The action *contraria* was at the instance of the creditor, by which he could obtain reimbursement of any necessary expense he had been put to in preserving the pledge; or indemnification, where he had been dispossessed of the pledge, which might occur where the debtor had pledged something not his own.

ACTIO QUANTI MINORIS.—This action, as well as the *actio redhibitoria*, arose from the contract of sale. If the purchaser, after delivery, discovered some latent fault in the subject purchased, he was entitled by the *actio redhibitoria* to have the seller ordained to take back the subject and restore the price; or, if the purchaser was so disposed, he might retain the subject, and under the action *quanti minoris* (which was also called the *actio æstimatoria*) recover as much of the price as exceeded what he might reasonably have given for the subject had he known of the defect. The *actio redhibitoria* could be raised any time within six months of the sale, and the *actio æstimatoria* within a year, but of these actions the purchaser had merely an alternative choice, for the raising of one of them, excluded the other. The *actio quanti minoris*, in so far as it proceeds upon the ground of the value of the subject being disproportioned to the price paid, is rejected by the Scotch law, but the *actio redhibitoria* is allowed in those cases where the purchaser was not bound, and could not satisfy himself of the soundness of the subject bought, as for example in the case of purchase by sample. The subject, however, in such case, cannot, as under the Roman law, be retained for six months. The examination of it must be made with all due speed, and undue delay in objecting

to the character or quality of the subject, will bar all action for restitution of the price.

ACTIO REDHIBITORIA.—See above.

ACTIO TUTELÆ VEL CURATELÆ.—An action (*directa*) competent to a minor or his heirs against a tutor or curator when his guardianship came to an end, to compel him to render accounts of his intromissions, and pay over the estate to the minor. The tutor or curator had the *actio contraria* under which he might obtain indemnification for all expenses incurred and engagements contracted by reason of the guardianship, as well as a discharge of his office and administration.

ACTIO VENDITI.—See *Actio empti.*

Actio contra defunctum coepta, continuatur in hæredes.—An action commenced against a person deceased transmits against his heirs. This rule is not universal, because there are actions properly personal, which do not transmit either to, or against heirs. Such are all actions for recovery of penalties arising *ex delicto*, which do not transmit against the heir, who is not liable for his ancestor's delict. Penal actions do not transmit, but it is otherwise as regard actions for civil reparation and damage. Some actions, (as for example, actions for damages on account of defamation, &c.) being in a measure personal and not transmissible in the ordinary case, do nevertheless transmit to, and against heirs, if there has been litiscontestation.

Actor.—Pursuer or Plaintiff. *Reus.*—Defender or defendant.

Actor debet sequi forum rei.—A pursuer must follow the forum, or court of the defender; that is, a pursuer raising an action against his debtor or obligant, must do so before the forum or court within whose jurisdiction the defender may be at the time. The rationale of this rule is obvious; for if the defender be outwith the jurisdiction of the Court, before which he has been cited, any decree of that Court will be valueless, there being no way of enforcing it.

Actor sequitur forum rei.—A pursuer follows the forum or court of the defender. Another and more frequently adopted form of the preceding phrase.

Actore non probante absolvitur reus.—A pursuer not

having proved his case, or established his claim, the defender is assoilzied. It lies with a pursuer to substantiate any claim which he advances, and until he does so, the defender cannot be required to refute it. Thus where the question is a right of possession of a subject, held by the defender, he (the defender) is not bound to shew any title to the possession, until the pursuer has shewn a sufficient title to call that possession in question. Nor can he be dispossessed, until the pursuer shews a better title than that on which the defender holds.

Actori incumbit probatio.—Proof (of his case) is incumbent upon a pursuer. Another form of the preceding phrase.

Actum et tractatum.—Done and transacted. See Ersk., B. 3, T. 4, § 22.

Actus.—One of the chief rural servitudes of the Roman law, which conferred upon the dominant owner the right of driving cattle or a vehicle along the road or way, burdened with the servitude. It generally included the servitude of mere right of passage, called the *jus eundi*. The right of *actus* was the *jus agendi*. Similar to the *actus* are the Scotch servitudes of Horse road, Coach or Cart road, and Loaning for Cattle.

Actus animi.—An act of the mind: intention. The *animus* enters into many questions of law, as an essential element. Thus, for example, in acquiring a domicile, mere residence is not sufficient, if there be not the intention to acquire it, as domicile can only be acquired *animo et facto*. Again, consent, which is essential to all contracts, is an *actus animi*, and is presumed in all cases where the contract is *ex facie* regular. But this presumption may in certain cases be redargued, as in the reduction of a deed, on the ground of force or fear. In such cases, however, the burden of proving lies upon the person challenging the contract or deed.

Actus legitimus.—A legal act, *i. e.* an act requiring legal solemnity in its performance. The solemnity may consist in the form of the procedure, or the persons present at its performance. Such acts were numerous under the civil law, including *mancipatio, acceptilatio, tutoris datio*, &c. The old ceremony of giving sasine in our law, was such an act, requiring the observance of certain solemnities in its performance, as *ex. gr.* the presence of the superior or his bailie upon the

ground, with the notary, witnesses, and attorney of the disponee, the delivery of the requisite symbols, taking instruments, &c.

Ad auctoritatem præstandum.—For interposing or adding their authority. Interdictors and curators *ad lites* are appointed for this purpose merely, and incur no personal liability, through the performance of the duties of their office. Tutors and curators, the one given as a guardian of the pupil's person, the other, of the minor's estate, are liable for the exercise of a care and diligence, in which persons of the class we are dealing with are not bound. Interdictors give their consent to the deeds of the person interdicted, and by such consent incur no responsibility in warrandice, &c.; while curators *ad lites*, by their becoming parties to a suit in that character, incur no liability for expenses, &c. Such persons are appointed merely to their respective offices *ad præstandam auctoritatem*.

Ad captandum lucrum.—For the purpose of making gain. Stair, B. II., T. 4, § 54.

Ad captum vulgi.—Suited to the common understanding; easily understood. The phrase is used by Erskine (quoting from the aphorisms of Bacon) as expressive of the manner in which statutes treating of matters "concerning which persons do not usually advise with lawyers, but trust to their own judgment," should be framed.

Ad civilem effectum.—As to the civil effect. The civil effect referred to in this phrase is the effect or result of any act at common law, as distinguished from the effect or result of the same act before a criminal tribunal. Many acts have this double effect. A person charged with culpable homicide may be sentenced to be punished for his criminal act by the Justiciary Court, but that does not exclude the civil effect of his act, which still exists in the shape of an action for assythment at the instance of the next of kin of the deceased. A thief is liable at common law for the value of the goods stolen. The civil effect of the crime of perjury was formerly, to render the person guilty of it incapable of bearing testimony in a court of justice. The decision of the one court on the civil effect of an act does not in any case rule the decision of the other court. The Court of Session may find that a bill alleged to be forged is a valid document of debt, and give decree

on it, but that will not prevent a criminal prosecution, nor the punishment of the forger, if his crime is made clear before the Court of Justiciary; while, on the same principle, should the alleged forger be acquitted on the criminal charge, the Court of Session may, nevertheless, hold the bill to be a forgery, and assoilzie the defender.

Ad convincendam conscientiam judicis.—Sufficient to satisfy the moral conviction of the judge. (Stair, B. 4, T. 45, § 11). This refers to questions of probation, where direct proof of acts alleged cannot be obtained, and where the judge is entitled to accept of less than such direct evidence. This used to occur frequently in cases of affiliation, where the judge might be satisfied of the paternity without direct proof of connexion, although in such cases the proof required to amount to more than affording a ground merely for suspicion. When the mind of the judge has thus been convinced, an oath in supplement is allowed to complete the otherwise defective proof; but the oath in supplement is now scarcely known in practice, as by the Act 16 and 17 Vict., cap. 20, parties are allowed to be examined as witnesses for themselves in almost all cases. On this point, see the opinions given in the case of *Scott*, 2d Dec. 1856, 19 D. 119.

Ad factum præstandum.—For the performance of a certain act. In popular language almost all obligations may be said to be of this class, but there are only obligations of a peculiar character denoted by the legal signification of this phrase. The obligation of a debtor is clearly one for the performance of a certain act, namely the payment of his debt; but a decree at the instance of his creditor would not be termed a decree *ad factum præstandum*. An obligation *ad factum præstandum* is one for the performance of an act within the power of the obligant, and thus a decree of the Court, ordering delivery of certain writs, would be so termed, as also would a decree charging a superior to enter a vassal to whom he had refused an entry. The difference between an ordinary decree and one *ad factum præstandum* is of no great practical importance in the present day, although it was not always so; for a very material difference existed between the obligation for payment of liquid debts and the performance of acts within a person's power. For recovery of a debt the creditor

could attach the debtor's estate, real and personal, but obligations *ad factum præstandum* could be made effectual by letters of horning. Under that form of diligence, if a person was put to the horn for non-performance, he was held to be a rebel, his goods were escheat, and for putting him to death no one could be punished. Letters of horning were afterwards (1584) granted for payment of debt, but the effects formerly resulting from this kind of diligence were abolished by the Act 20 Geo. II., cap. 50. By the Act 1 and 2 Vic., cap. 114, letters of horning are declared to be still competent, but it is provided that a creditor adopting that form of diligence shall not be entitled to recover the expenses incurred by it, unless he can show that it would have been incompetent to have proceeded under the simpler form of diligence introduced by that statute. There is still this difference between an ordinary debtor, and a debtor *ad factum præstandum*, that the latter is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum*.

Ad infinitum.—Without limit.

Ad levandam conscientiam.—For the purpose of easing or disburdening the conscience. Confessions so made, when proved, are conclusive against the person confessing, in regard to the subject matter of the confession. It sometimes happens that such confessions are made by criminals on their apprehension, and if so, they may be adduced in support of the prosecution against them. But if a person charged with a certain crime has been apprehended on that charge, and in answer to certain questions put by the apprehending officer, admits or confesses to certain points material to the prosecution, the substance of the prisoner's answers cannot be received as evidence against him. It is *ultra vires* of the officer to interrogate the prisoner; this can only be done by the proper authority, in the presence of a magistrate, whose duty it is to warn the prisoner that any statement he makes may be used against him, and to see any such statement, when made, fairly taken down. This is an established rule. See the cases of *Hay*, 8th October 1858, 3 Irvine 181; and *Millar*, 2d April 1859, 3 Irvine 406.

Ad litem.—To the action. When persons of tender years, or females, are pursuers in any action, the Court appoints a curator *ad litem*, to watch the progress of the action, and see

that everything is done for the interest, and nothing to the disadvantage of the ward to whom he has been appointed curator. See *Ad auctoritatem præstandum.*

Ad longum.—At length.

Ad omissa vel male appretiata.—To things omitted or undervalued. Every executor confirmed before the Commissary is bound to give up an inventory of the whole moveable estate of the deceased to whom he has been confirmed executor; but in the event of his afterwards discovering that he has omitted to give up part of the estate, or has undervalued that which has been given up, he may rectify this by expeding an eik to the inventory; or, failing his thus rectifying the inventory, any one having an interest may apply to have the executor compelled to do so, or to have himself confirmed executor to the things omitted or undervalued. Should the executor die before the executry has been administered, the next of kin after the deceased executor may obtain confirmation *quoad non executa*, i.e., in reference to those parts of the estate not administered, or those duties of executor not performed.

Ad pares casus.—To similar cases.

Ad perpetuam rei memoriam.—For a perpetual record of the matter. By the statute 1685, a register-book is appointed to be kept, in which entails are to be recorded, with the name of the maker, the heirs, the provisions and conditions of the entail, "all to remain in the said register *ad perpetuam rei memoriam.*"

Ad perpetuam remanentiam.—To remain for ever. Resignation, one of the oldest forms of transmission of a feudal right, was of two kinds, viz., resignation *ad perpetuam remanentiam*, and resignation *in favorem*. The former was used when the vassal surrendered to the superior the right of property which he held, that it might be reincorporated with the right of superiority, and remain with the superior; the latter, when the vassal, having sold his right of property or feu to another, resigned it into the hands of the superior *in favorem*, *i.e.*, in favour of the purchaser, "in order that it might be conferred by the same power upon the new vassal, and carry with it the same assurance of protection." (Menzies' Lectures, 588). By the resignation *ad remanentiam*, the rights of property and superiority, formerly separated, became consolidated in the

person of the superior. The possession of a procuratory of resignation *in favorem* entitled the disponee to demand and enforce an entry with the superior; but the mode of making up a title by an instrument of resignation *in favorem* has been abolished.

Ad pristinum statum.—To the former condition.

Ad reprimendam improbitatem hoc genus hominum.—To repress the dishonesty of this class of men. Innkeepers, shipmasters and others, to whose care goods of considerable value are often committed, were supposed to possess great facilities for committing theft with less than usual probability of detection. With the view of checking the dishonesty of such persons, peculiar responsibilities were imposed upon them regarding the careful preservation of things placed in their charge, and they were made liable for the full value of the subject lost. The edict of the Roman praetor, *nautae, caupones, stabularii,* (to be noticed hereafter) was given to repress this dishonesty.

Ad rimandam veritatem.—For the purpose of investigating the truth. Although as a general rule writings cannot be cut down or explained by parole testimony, yet in some cases, on the principle of the phrase, such testimony is admitted. A deed may be reduced on the parole testimony of the testamentary witnesses, if they swear that they were not present at the subscription, and did not hear the signature acknowledged; a decree on a bill or bond may be refused, if it can be proved that the document of debt was obtained through fraud; and parole testimony is admitted, to remove any doubt which may arise from latent ambiguity in a deed.

Ad similes casus.—To like cases.

Ad sustinenda onera matrimonii.—To bear the burdens or expenses of the married state. The dowry brought by a wife at her marriage is given to the husband for this purpose, and he is not liable for his wife's debts after her decease, unless the dowry has been excessive; for, otherwise he is not accounted *lucratus* by the dowry, it having been given for the onerous cause of meeting the expenses of the married state, and presumed to have been so expended. Dowry being given for this purpose, should the marriage be dissolved by divorce on account of the husband's delict, the husband is bound

to restore it, there being no room for its intended application; in which case, not only can the wife recover her dowry, but also all her legal and conventional rights in the same way as if her husband had died. Should the divorce proceed upon the delinquency of the wife, the husband retains the dowry as if the wife had died, and it had been expended during the subsistence of the marriage.

Ad valorem.—According to value.

Ad vindictam publicam.—For the maintenance and defence of the public interest. For this purpose the Lord Advocate of Scotland, or those to whom he delegates his authority, are the public prosecutors of all criminals, and although a crime committed has been condoned or discharged *ad civilem effectum* by the person entitled so to do, this does not preclude the prosecution of the criminal, as the public interest demands that all criminals should be punished,

Ad vitam aut culpam.—For life or till fault; said of an office so held, where the tenure of the possessor is determinable only by his death or delinquency.

Ad vitandum perjurium—For avoiding perjury. Stair, B. III. T. I. § 41. See *Ob metum perjurii.*

Addictio in diem.—A condition or agreement sometimes added to the contract of sale under the civil law, by which the seller reserved right to himself to annul the sale, if within a certain fixed time he met with a better offer. Such a condition is not known in our law, but there was a practice very much similar to it, before ward holdings were abolished. Before that time, superiors were entitled to the casualty of recognition, which implied a forfeiture on the part of the vassal of his fee, on alienation of more than one half thereof, without the superior's consent. To avoid the forfeiture it was common to insert in the deed of conveyance a clause to the effect, that the disponee should have no right to the property until the superior's consent was obtained, and this operated like the *addictio in diem*, as a suspensive clause, preventing the transmission of any real right until the condition was purified.

Aditio hæreditatis.—The entering upon, or taking up a succession; and that whether in moveables or heritage.

Adpromissor.—Cautioner. The *adpromissor* of the Roman

law is to be carefully distinguished from the *fidejussor*. The obligation of the former was one which could only be undertaken by a Roman citizen, was limited to verbal contracts, was only binding for two years, and did not transmit against heirs. The latter (*fidejussor*) could be added to any kind of contract; his obligation was not limited to any precise period, and not only bound himself, but his heirs. The *Senatus-consultum Velleianum* forbade women binding themselves as cautioners for another person.

Adscriptitii.—A class of slaves who were attached to certain lands, neither of which could be sold separately, so called, because they were *adscripti glebæ*, joined to the land. They were entitled to retain for their own use, all they could gain from the land, beyond the value of a yearly payment, which they had to make to the owner of the soil; they enjoyed also all the family rights of freemen. "Their situation was very similar to that of the workmen employed in collieries and salt-works in Scotland, before the passing of the Stat. 15 Geo. III., cap. 28." (Bell's Dict., *h. v.*)

Advocatus ecclesiæ.—The patron of a benefice or living.

Affinitas affinitatis.—Affinity of affinity. This constitutes no relationship. The brother of a husband is no way thereby related to the sister of the wife; but this is the kind of tie known as *affinitas affinitatis*.

Affirmanti incumbit probatio.—The burden of proof lies with the party affirming. Negatives cannot be proved; they are presumed, and need no probation, but any one alleging a fact, is bound, when it is disputed, to prove it. The *onus probandi* in the ordinary case, lies with the pursuer of an action, when the defender denies the obligation on which he is sued; yet, when the defender admits the obligation, but objects to its fulfilment, or alleges facts and circumstances purging the obligation, the burden of proving his defence lies with him.

Ager limitatus.—Bounded land. Lands contained in, what is technically known as, a bounding charter are so called. When lands are conveyed without their limits, (that is, their boundaries, not their measurement,) being specified, the disponee may acquire certain privileges, and even rights of property, over the other lands adjoining or discontiguous,

by forty years possession, the new right thus acquired, passing along with his own proper lands, as parts and pertinents, although not specified. No such additional right is ever acquired, under a bounding charter, for nothing attaches to it as part and pertinent, by prescription, outwith the specified boundaries. The *agri limitati* of the Roman law, were lands detached from the public domain, and converted into private property, by sale or grant, beyond the limits of which, the owners could claim nothing. Any addition around or beyond them, was public property.

Alibi.—Elsewhere. This is the name given to the special defence, sometimes put forward by a panel, in a criminal prosecution, to the effect, that at the time libelled, as the time when the criminal act was committed, he was in a different place, from that specified in the indictment. An *alibi* is the best defence which can be stated in such cases, if it can be clearly proved, but it is always regarded with great suspicion, and is very rarely successful.

Alienatio feudi.—Disposition or conveyance of a feu right. Such dispositions are not now restricted, unless by special arrangement, or condition, as in a deed of Entail. Formerly it was not so, for under the feudal system, no vassal could convey his right, without the consent of the superior. Fidelity and service, being the inherent conditions of a vassal's right; "the very nature of the contract, exempted the superior from having vassals imposed upon him, who were not selected by himself," (Menzies Lectures, 582.) Sub-infeudation was not regarded, however, as an alienation, for although this gave the *dominium utile* to the sub-vassal, it did not divest or discharge the original vassal, from whom the subaltern right flowed, of the duties and services owing to his superior, for which he was still liable. Such sub-infeudation did, notwithstanding, expose the rights of the superior to great risk, as they were necessarily rendered, in some measure insecure, by the divestiture of the immediate vassal, and it was as a protection against such risk, that the superior was entitled by the causalty of recognition, to resume the entire feu, if the vassal alienated more than half of it. "It is a remarkable evidence of the firmness of the grasp, in which the landrights of Scotland were held by the feudal rules, that these restraints

were not subjected to any mitigation, until the latter part of the fifteenth century—that, until the middle of the last century, the superior's power of refusal, could only be obviated by a legal device,—and that it was not entirely relaxed until by the Lands Transference Act of 1847, the last traces of the superior's power, to refuse entries to purchasers were removed." (Menzies, *ut supra*.) The restrictions on alienation were abolished at an earlier period in England, for by the Act 18 Edward I. cap. 1. (called the statute *Quia Emptores*, from its introductory words,) sub-infeudation was abolished, and the disponee upon infeftment, was constituted by force of law, the vassal of his author's superior. It has been said that the Scotch Act, 2 Rob. I. cap. 24, enacted similar provisions for Scotland, but the authenticity of that act has been seriously doubted, and even if authentic, there is every reason to believe that its provision was disregarded.

Alienatio feudifirmæ feudifirmarum.—The name given to an old form of conveyance introduced for the purpose of evading the prohibition of alienation of crown lands; to prevent which, so far as the crown was concerned, the act 1597 cap. 239 was passed, which declared all such conveyances null.

Alieni juris.—Dependent upon, or subject to the power of another. Under the Roman law, all persons were divided into two great classes, those *sui juris*, who were independent and not under the power of any other person, and those *alieni juris*. Children were *alieni juris* because they were subject to the *patria potestas*, and a wife (if the marriage had been contracted by one of the strict forms of the older law) was so being under the power of her husband. In Scotland there is no such thing as the *patria potestas* of the Roman law; but pupils who can of themselves perform no valid act, and enter into no binding obligation are called *alieni juris*, while minors who may enter into contracts, and whose deeds (except those diverting the succession to their heritable estate) are valid, are termed *sui juris*.

Alioqui successurus.—Otherwise entitled to succeed; or succeeding under a different title. In the general case, an heir who succeeds to an estate, incurs by his succession liability for the debts and obligations of his ancestor. As he takes the

estate of the deceased, with all its advantages, he is burdened also with its disadvantages. But if the heir succeeding to the estate can take it up in a different character, from that of heir of the last proprietor, if he be *alioqui successurus*, such liability is not incurred. Thus, if a son, on the death of his father, succeeds to an entailed estate, in terms of the destination in the entail, he does not, by making up his title thereto, render himself liable for his father's private debts. He incurs no representation, because he succeeds not as his father's heir-at-law, but *alioqui successurus*, namely as heir of entail. Or, again, if a father dispones to his son heritage burdened with certain conditions, to which that son was entitled to succeed simply under the terms of a deed granted by a previous ancestor, or, it might be, of the antenuptial marriage-contract of his parents, he may disregard the conveyance executed by his father, and elide the conditions imposed by it, by making up his title under the other deeds which gave him the right. If he could only take the heritage under his father's conveyance, he would be bound by the adjected conditions, but being *alioqui successurus*, he can disregard them, because he can disregard the deed which creates them. Under the old law, the casualty of recognition was not inferred where the vassal disponed his lands to one who was *alioqui successurus*, although such a conveyance to one who had not, and could not have any other than the singular title, inferred that casualty.

Aliqualis probatio.—Any kind of proof whatever, although not strictly in accordance with legal rules, and not resorted to when any other better evidence can be adduced. Ersk. B. 1. T. 7. § 36. See *Prout de jure.*

Aliud est possidere, aliud esse in possessione.—It is one thing to possess, another to be in possession. In common parlance, to possess, and to be in possession, are synonymous terms, but they have a widely different meaning in legal phraseology. To possess, implies the right of property; to be in possession, mere custody. Thus a landed proprietor possesses the farm of which his tenant is in possession; the lender possesses the subject of which the borrower is in possession; the owner of a lost or stolen article still possesses it when it is in the possession of a finder, or honest and onerous pur-

chaser. This difference is not altogether illustrated by the division of possession into natural and civil known in the Scotch law. For natural possession implies both property and custody, while *possidere* only necessarily implies the former, but civil possession is equivalent to *in possessione esse.*

Aliunde.—Otherwise. Proof of the resting owing of a debt falling under triennial prescription, can only be made by writ or oath of the party, an ordinary debt not falling under that prescription can be proved *aliunde.* "The husband is not liable for any debt contracted by his wife after inhibition, except for such furnishings suitable to her quality, as he cannot prove he provided her in *aliunde.*" (Ersk. B. 1, T. 6. § 26.

Allegatio falsi.—The statement of what is untrue. See *Expressio falsi.*

Alluvio.—This signifies the addition made to the lands of a riparian proprietor by the natural operation of the stream, whether by the slow retiring of the river itself and thus leaving a greater bank, or by the successive accumulation of soil brought down by it, washed from other lands. Such addition accresces to the owner of the land to which the addition is made. This gradual addition is to be distinguished from *avulsio,* which is the violent tearing away of ground belonging to one proprietor by a torrent or inundation or any convulsion of nature, and subsequent depositation of it along the bank of another's land. In such case the land thus added does not accresce, but remains the property of the original proprietor. It is also to be distinguished from *alvei mutatio,* which is the change occasioned when a river bounding the lands of conterminous proprietors, changes or deviates from its course. Any addition thus made to the lands of one of the proprietors does not accresce, but, as in *avulsio,* remains the property of him to whom it originally belonged.

Alternis vicibus.—Alternately, by turn. The right of presentation to a benefice was directed to be thus exercised by the act 1617 cap. 3, where two churches formerly belonging to different patrons, were united.

Alterum non lædere.—To injure no one. This is one of the three fundamental maxims, or first principles, laid down by Justinian, as those upon which all rules of law are based.

The other two were, *honeste vivere*, to live morally, and *suum cuique tribuere*, to give every one that which is his due.

Altius non tollendi.—Literally, of not raising higher. This was one of the Roman law servitudes, by which the owner of the servient tenement was held bound not to raise his building to a height which would be prejudicial to the dominant tenement. Some writers on the civil law mention a servitude *altius tollendi*, but the majority of writers agree that this could not, properly speaking, be a servitude. Most probably the term was used as a means of extinguishing the servitude *altius non tollendi*, and thus restoring to the owner of the servient tenement the natural power of a proprietor to raise a house or other building on his own land, to whatever height he pleased.

Alvei mutatio.—A change in the course or of the bed of a stream. See *Alluvio*.

Alveus.—The bed or channel of a river.

Ambiguitas latens et ambiguitas patens.—Latent and obvious ambiguity. The difference between these two kinds of ambiguity is important, and they are treated differently in the cases where they respectively arise. The ambiguities in question are those which arise from the terms in which a deed or instrument is expressed. A latent ambiguity is that which does not appear from the face of the deed, but which arises from some extraneous circumstance or collateral fact. In this case a proof is allowed to clear up the ambiguity, and take away the doubt it gives rise to. For example, if A. dispones, by *mortis causa* deed, to B., his tenement in Princes Street, Edinburgh, and, on his death, is possessed of two tenements in that street, there arises an uncertainty as to which of the two tenements it was intended should become the property of B. There is no ambiguity on the face of the deed, which clearly enough dispones a tenement situated in a certain street; but the ambiguity arises from the fact external to the deed, that there are two tenements falling under the same description. To remove this doubt proof of the intention of the disponer would be allowed. A patent ambiguity, on the other hand, is that which appears *ex facie* of the deed. As if a destination was expressed thus:—"To A. and B. and heirs;" or, "to A. and B. jointly, and his heirs." The doubt here arises, to whose heirs does the destination

carry the subjects on the death of the disponees. In this case the law allows no proof of intention, and the Court will deal with the right of succession, regarding which the doubt exists, as the general tenor of the deed seems to warrant. (See Lord Bacon's Maxims of the Law, Reg. 25 ; Lord Chancellor's Speech in Morton *v.* Hunter, 26th Nov. 1830 ; 4. W. & S., 379).

Amicus curiæ.—Literally, a friend of the Court ; the name given to any bystander, who, without having any interest in the cause, of his own knowledge, makes a suggestion on a point of fact or law, for the information of the Court, or to correct a mistake.

Animo defamandi.—With the intention of defaming. This enters as an element into every action for damages or solatium on account of verbal injury. It is that malice which is essential in such cases, and may be either actual or implied.

Animo differendi.—For the purpose of obtaining delay; a presumption against the proceedings of the defender in a cause, according to Stair. (B. 4, T. 40, § 12).

Animo donandi.—With the intention of giving as a donation. This is rarely presumed, and only so when the act can bear no other construction. A debtor is never presumed to give in donation ; but where spouses enter into contracts with each other, which are either gratuitous or without equivalent consideration, a different rule is observed, for there the law presumes donation ; allowing the presumption to be redargued by proof. (Bell's Prin., § 1616).

Animo obligandi.—With the intention of entering into an obligation. Certain words uttered with this intention would complete an obligation, while the same words, used merely in jest, would not. "To a perfect obligation it is necessary that there shall be a deliberate and voluntary consent and *purpose* to engage." (Bell's Prin., § 10).

Animo remanendi.—With the intention of remaining. Said of a person leaving a country without meaning to return.

Animo revertendi.—With the intention of returning. Said of a person leaving a country merely for a temporary purpose ; as, for example, a sailor in following out his occupation, but with the intention to return.

Animus.—Will ; intention.

Animus gerendi.—See *Gestio pro hærede.*

Animus immiscendi et adeundi hereditatem.—The intention of meddling with and taking up a succession. It is of importance to shew, by his acts, that an heir acted with this intention, in a question whether he has incurred representation to the deceased by intromission.

Animus injuriandi.—The intention or desire of injuring. See *Animo defamandi.*

Anni continui.—Years successive, continuous, without break or interruption.

Anni utiles.—Literally, years which can be used; years in which a right can be exercised.

Both these phrases are most frequently to be met in cases where a question of prescription is at issue. Against any one fully able, during the whole period, to assert and defend his right, the years of prescription are *anni continui;* but as the loss arising from the currency of prescription is considered as the penalty of negligence, the prescriptive years are not so regarded in the case of one under a legal incapacity to sue. If an heritable right is being acquired by prescription against the proprietor of lands, or if a title, questionable in itself, is becoming valid through prescription, and a minor becomes entitled to that right against which prescription is running, the currency of the prescriptive period ceases, until the minor is *valens agere,* i.e., in a position to defend his right on attaining majority. Although, therefore, the prescriptive period may in reality have expired, yet as there were some years which were not *anni utiles* to the minor, prescription does not take place. On the succession of the minor the currency of prescription ceases, and only resumes when he has become *valens agere.*

Annus deliberandi.—The year for deliberating; being the year allowed to an heir to deliberate whether he will take up the succession devolving upon him, and represent his ancestor. This year commences as at the date of the ancestor's death; and should the apparent heir die during his year of deliberation, the next heir has a year from the death of the apparent heir. The year for deliberation has now been reduced to six months. 21 and 22 Vict., cap. 76, § 27.

Annus inceptus pro completo habetur.—A year begun is

held as completed,—a rule of very limited application. See Stair, B. 2, T. 8, § 34.

Ante litem motam.—Before an action has been raised. Any stranger intromitting with the estate of a deceased person without title, incurs by such intromission a passive title, rendering him generally liable for the deceased's debts. Such vitious intromission is purged, and the passive title not incurred, if the intromitter confirms himself executor, before any creditor has raised an action against him on the passive title. If the intromitter have an antecedent title, such as next of kin, or relict, a passive title is not incurred if confirmation is expede within a year of the deceased's death, even although an action has been raised by a creditor before that time.

Ante omnia.—Before any other thing is done or considered; first of all. A preliminary defence objecting to the pursuer's title, or to the jurisdiction of the Court, is discussed *ante omnia*, because, if sustained, all further procedure is stayed.

Ante redditas rationes.—Before accounts are rendered, or given up. On the expiry of a tutory or curatory, no action can be raised against the pupil or minor for payment of advances made, or relief from obligations undertaken on their behalf, at the instance of the tutor or curator, until they have rendered accounts of their intromissions with the ward's estate. In a word, until this is done they cannot insist in the *actio contraria tutelæ vel curatelæ*.

Antiqua et nova.—Old and new rights. The technical terms in our law equivalent to these Latin terms are, heritage and conquest; heritage (*antiqua*) being that estate to which any one succeeds as heir; conquest (*nova*) that which he succeeds to or acquires by purchase, gift, or any singular title.

Antiquus et novus extentus.—Old and new extent. Extent is the name given to the ancient valuation put upon all lands in Scotland, for the purpose of regulating the proportion of public subsidies and taxes which each should bear, as well as for fixing the rights of a superior under his different casualties. It is conjectured by Lord Kames that the old extent is the value of lands ascertained about the year 1280, and that subsequently the lands having been much deteriorated by the frequent wars of the period, several such valuations were made, which

were designated the new extent. Under the old form of special service, one of the enquiries directed to be made by the brieve of inquest was, " *Quantum valent dict. terræ* NUNC *per annum et quantum valuerunt* TEMPORE PACIS," (*i.e.*, How much is the yearly value of the said lands now, and how much in time of peace?) " It was extremely natural to characterise the old extent by the phrase *tempore pacis*, not only as made in a peaceable reign, but also in opposition to the new extent, occasioned by the devastation of war." (Kames' Law Tracts). The new extent, properly so called, was introduced by the statute 1474, cap. 55.

Applicando singula singulis.—Literally, by applying each to each; that is, to apply each special condition, provision, declaration, &c., as the case may be, to the particular subject to which it is referable. This is a well known rule adopted in the construction of deeds,—an instructive illustration of which will be found in the case of *Bontine*, 12th June 1835, 13 S, 905.

Approbans non reprobat.—One approbating cannot reprobate. See *Qui approbat, &c.*

Apud acta.—Literally, among the acts. This expression refers to orders judicially pronounced in open court in presence of parties, and to which obedience must be paid without farther notice or requirement. Thus, in a criminal process, the Court may adjourn the trial to a specified day, and this being intimated *apud acta* to witnesses, assizers, and parties, is sufficient to require their attendance without farther citation. This mode of citing parties is not uncommon in the procedure before Church Courts.

Aquæductus.—The rural servitude of aqueduct, being a right to conduct water through the servient tenement by means of pipes, canals, &c.

Aquæhaustus.—Another rural servitude conferring right upon the dominant owner of watering his cattle at any stream, well, pond, &c., in the servient lands; including of course the servitude of *actus*.

Arma in armatos sumere jura sinunt.—The laws permit arms to be used against the armed; or, to resist violence by violence. If any one attempts by violence to dispossess another of a subject in his possession, the possessor may use

violence to *maintain* his possession, but not to *recover* that of which he has been so deprived.

Arrestum jurisdictionis fundandæ causa.—An arrestment used for the purpose of founding a jurisdiction. The effect of this arrestment is to render the person against whom it has been used amenable to the jurisdiction of the Scotch Courts, but does not operate as an arrestment in security; nor can a jurisdiction be thus founded in questions of *status*.

Arrhæ.—Earnest, or Arles. A small sum of money or other commodity often delivered and received in token of the completion of a bargain.

Arrhæ sponsalitiæ.—A pledge or earnest given, under the Roman law after betrothal, by the man to his betrothed, which he forfeited if he afterwards, without cause, declined to fulfil the engagement entered into. If the bride resiled from the engagement, she was, in the general case, obliged to restore the pledge thus given, and as much more; but in certain cases, she was merely bound to restore the pledge itself.

Assignatus utitur jure auctoris.—An assignee exercises the right of his cedent. The assignee not only becomes entitled to the right or subject assigned, but also to the actions at law by which the right may be enforced. In some cases such action must be specially assigned, as in the case of an assignation of a bill, on which diligence has been done, where, unless specially assigned, the diligence does not pass to the assignee, although at common law he may otherwise enforce payment. Exceptions competent to the debtor against the cedent, are for the most part effectual against the assignee, although in the case of bills (which are peculiarly favoured), no exception pleadable against the original creditor, if merely personal, and not inferring inherent nullity, can be maintained against an indorsee.

Asyla.—Sanctuaries; places of refuge. Such, for example, as the Abbey at Holyrood Palace. This is merely a refuge from civil diligence; but under the Roman law *asyla* were chiefly founded for the purpose of protecting slaves from the severity of their masters, and they afforded protection also to any who had been guilty of the minor delinquencies.

Auctor in rem suam.—One who acts for his own behoof. A tutor or curator cannot so act in reference to the estate of

his ward, either by purchasing (except at public auction, Ersk., B. 1, T. 7, § 19) any part of the ward's estate, or by giving his consent to any deed granted by the minor, in which he, the curator, has a substantial interest.

Avizandum.—To be looked into, or considered. A process is said to be at avizandum when the Judge, after debate, is considering it with the view of pronouncing a decision. When a Lord Ordinary transmits or reports a case to the Inner House, that parties may be heard and decision pronounced there, he is said to make great avizandum with the cause.

Avulsio.—The violent separation of a portion of land by a torrent or inundation or any convulsion of nature, from the property to which it originally belonged, and the depositing of it on, or beside the property of another proprietor. See *Alluvio.*

B

Baratriam committit qui propter pecuniam justitiam baractat.—He commits baratry who perverts justice for a bribe. This practice, although quite unknown in Scotland now, was at one time so general as to call for an Act for its suppression. By the Act 1540, cap. 104, it was provided that judges who, through wilfulness, corruption, or partial affection, used their authority as a cover for injustice or oppression, should be punished with the loss of honour, fame, and dignity. *Barratria* was also used to signify simony. It is so used in the Act 1427, cap. 107, where it denotes the crime of clergymen, who went abroad, or exported money, for the purpose of purchasing benefices from the see of Rome. But barratry is only used now to signify any illegal and fraudulent act on the part of the master and crew of a ship, to the prejudice of its owners. See *Crimen repetundarum.*

Bellum inter duos.—A hostile meeting between two persons; a duel. If death ensues to either of the principals in a duel, however fairly the combat may have been conducted, the survivor and the seconds are held guilty of murder. By the Act 1696, cap. 35, it was enacted, that whatever person, principal or second, should give a challenge to fight a duel, or should accept a challenge, or otherwise engage therein, should be punished by banishment and escheat of moveables, although no fighting should ensue.

Beneficium.—The name at one time given to a feudal grant. Originally the grants of land made by the chiefs to their followers, as rewards for past services, and to ensure fidelity and future service, were called *munera*, and were revocable at

the pleasure of the granter. In the seventh and eighth centuries, however, these became grants for life, and acquired the name of *beneficia;* and afterwards, when feudal rights had attained what Craig calls their manhood, under Charlemagne, they received the title of *feuda*, because descendible to heirs, and transmissible to collaterals deriving right from a vassal in the fee. "This last character was conferred by the Emperor Conrad in 1026, on the eve of an important military expedition, which shews that the spirit of conquest retained in fidelity by the original precarious grants, had become so tamed down by the lapse of centuries, as to require a boon, which made those grants the absolute property of the vassals, to rouse it to sufficient exertion. Duff's Feud. Con. 39.

Beneficium cedendarum actionum.—The benefit or privilege of assigned actions. This was a benefit or right conferred upon a co-cautioner by the civil law, entitling him to demand from the creditor an assignation to the actions competent to him, against the principal debtor in respect of the debt due, on payment thereof being made. Under the civil law, co-cautioners each became bound by *stipulatio* for the whole debt, and there was no obligation or ground of action on which they could operate reciprocal relief. This *beneficium* was introduced as an equitable remedy, whereby any one of the co-cautioners, having paid the debt, could demand an assignation to the creditor's action *ex stipulatu*, under which (suing rather in the character of creditor than as co-cautioner) he could compel his co-sureties to repay him the shares respectively due by them, or enforce payment of the whole from the principal debtor. This is not necessary under the Scotch law, where co-cautioners have right of relief at common law; but a cautioner making payment of the debt may require the creditor to assign his right to him, along with the documents or grounds of debt.

Beneficium competentiæ.—The benefit of a competence. This was also a benefit or right conferred by the civil law, under which the granter of a gratuitous obligation, whose circumstances had become embarrassed prior to its fulfilment, was entitled to decline such fulfilment, except to the extent of his ability to do so, after retaining what would be sufficient for his own maintenance. Thus, in an action at the instance of

a wife against her husband for restitution of her dowry, the husband was entitled to plead this *beneficium*, and was only condemned to pay that which his means could afford. This plea was allowed in all cases between husband and wife, except where the claim made was grounded on delict; and also in cases where one brother sued another; but this privilege was personal, and did not avail heirs or sureties. The law of Scotland confers this privilege on fathers and grandfathers against children and grandchildren, because the children are bound, at all events, to maintain their indigent parents, but it does not extend it to strangers, or even to the case of a brother against a sister.

Beneficium divisionis.—The benefit of division. Under the old Roman law, co-cautioners were each liable to the creditor for the whole debt, it being in the power of the creditor to enforce payment of the whole from any one of the co-cautioners, whom he might choose to sue. But this privilege was introduced by a rescript of the Emperor Hadrian, by which the surety against whom the creditor sought an action, might require the Praetor, in granting one against him, not to grant it for the whole debt, but only for his portion, so as to compel the creditor to sue each of the sureties for their portions respectively. This is a privilege competent to a co-cautioner under the law of Scotland, where he has bound himself simply as cautioner, along with another, for the principal debtor. If, however, the co-cautioners bind themselves, conjunctly and severally, for and with the principal debtor, the benefit of division is lost, and the creditor may recover the whole debt from any one ot the co-obligants.

Beneficium inventarii.—The benefit of inventory. This is also borrowed from the civil law. By taking up a succession, the heir made himself liable for the whole obligations of the deceased; but if he undertook the succession *cum beneficio inventarii*, he was only liable for such obligations to the extent of the deceased's estate. Justinian provided, however, that if an heir demanded a period for deliberation, he should forfeit his right to this *beneficium*. In Scotland the same privilege was conferred by the Act 1695, cap. 24, whereby an apparent heir, within a year and a day after his predecessor's death, was permitted to take up the succession on inventory,

according to the practice in moveable succession. By the Act 10 and 11 Vict., cap. 47, decrees of special service, or of general service with specification, are declared to infer only a limited passive representation to the deceased, to the extent or value of the lands embraced by the service.

Beneficium ordinis.—The benefit of discussion. A right which formerly every cautioner had at common law to insist upon the creditor's using all proper diligence to recover the debt from the principal debtor, before claiming it under the cautionary obligation. This right was presumed to be reserved, unless specially renounced by the cautioner; but, by the Mercantile Amendment Act (19 and 20 Vict., cap. 60) this rule was altered, and the creditor is now entitled to proceed at once against the cautioner, unless the benefit of discussion has been specially reserved.

Billa vera.—A true bill; the words indorsed by the grand jury in England on any bill of indictment, when they are of opinion that the evidence laid before them is sufficient to warrant a trial. If they entertain an opposite opinion, they formerly indorsed the word *ignoramus* (we are ignorant, or we do not know) upon the bill. They now use the words "no true bill," or "not found," which stops farther proceedings, and procures the discharge of the suspected criminal.

Bona castrensia et quasi castrensia.—These were the goods which a filius-familias, under the Roman law, was entitled to bequeath by will, or otherwise dispose of without the consent of the pater-familias. Being under the power of his father, all property which he acquired, generally speaking, became the property of his father; but, in course of time, the Emperors allowed sons to acquire certain goods of their own, which were called *peculia*. These were four in number. The *peculium profecticium* comprised everything derived by the son out of the estate of the father, but in this the father acquired the absolute property. The *peculium castrense*, being property acquired by the son on account of military service (thence deriving its name), as well as the *peculium quasi castrense*, comprising all presents from the Emperor, and everything acquired in the exercise of civil and ecclesiastical duties, were the absolute property of the son, of which he could dispose by will or otherwise. The *peculium adventicium* com-

prised everything coming to the son, except in the three ways already stated; but this was subject to the management of the father, and of which he enjoyed the usufruct or liferent. On the father's death, but only then, this *peculium* became the absolute property of the son.

Bona fide possessor, in id tantum quod ad se pervenerit tenetur.—A possessor in good faith is only liable for that which he himself has obtained. He is a *bona fide* possessor who possesses a subject on a title which he honestly believes to be good; and so long as he possesses in that character the fruits he gathers and consumes cannot be claimed from him. Fruits not gathered, however, go, with the property, to the real owner. A possessor *in mala fide*, who knew, or might have known, that he had no right or title to the subjects, is not only liable to restore what he has actually gathered or received out of it, but also all that which the subjects were capable of yielding, whether yielded or not, known in Scotland by the name of violent profits.

Bona fides.—Good faith.

Bona vacantia.—The goods of persons dying without successors. Such goods become the property of the Crown, as *ultimus hæres*.

Bonorum possessor.—Possessor of goods. This name was given under the civil law to the person put in possession of the goods or estate of a deceased person by the Praetor. This proceeding before the Praetor was one more of equity than law. For example, if a man died intestate, whose child was precluded from being *heres* by the civil law, on account of *capitis diminutio*, or otherwise, the Prætor overlooked the strict rule of law, and gave possession to the child; or, again, if the deceased left no heir, at least no relative which the civil law regarded as legal heir, the Prætor gave the possession of goods to relations, whom the law thus passed over.

Breve testatum.—The writing anciently delivered by a superior to his vassal, as an attestation of the fact that he, the superior, had conferred upon the vassal a grant of lands, and given possession of them. The *breve* was more the record of what had already taken place, than itself the grant; and was attested by the seals of the superior, and *pares curiae*. At a later period the *breve testatum* was signed by the superior,

wherever he happened to be, and possession was given separately by the superior's bailie.

Brevi manu.—Summarily, without a legal warrant. The expression is used to signify the performance of an act by a person on his own authority. Thus, a landlord, who ejects a tenant refusing to remove from the property when the legal term of his occupancy has ceased, without any warrant for such ejection, is said to act *brevi manu*. Such a power, by the older law of Scotland, was competent to the landlord; but it is not so now, and any such unwarranted proceeding would subject him in damages. Among the Romans, the phrase *brevi manu* was generally applied to a kind of constructive delivery. Thus, if a subject already pledged for debt, or deposited for security, was sold by the owner to the then holder of it, it was said to be transferred by *brevi manu* tradition. Delivery was essential to pass the property in the subject; but the act of delivery, in such a case, upon the new contract (that of sale), was dispensed with, or rather held to have been performed, to save the necessity of delivering up the subject to the owner, and again receiving it.

Brevitatis causa.—For the sake of brevity. A phrase used in law papers, where a document important to the cause is only referred to and not quoted. The reference has the effect of importing the document into the case, as completely as if it had been copied at length.

C

Cæteris paribus.—Other things being equal; in similar circumstances.

Canon.—A yearly payment in return for a grant of land, as in feus; and under the Roman law, for the right of *emphyteusis.*

Canon emphyteuticus.—The yearly payment made by the *emphyteuta* for his lands. If such payment was in arrear for three years, the *emphyteuta* forfeited his right to the subject; he did so if the yearly duty was in arrear for two years, where the right was derived from the Church. A somewhat similar provision was introduced into the Scotch law by the Act 1597, cap. 246, whereby it was provided that all vassals by feu-farm, failing to pay their duty for two years, should lose their right, in the same way as if an irritant clause to that effect had been specially engrossed in their charter.

Capaces doli.—Able to commit fraud. Under the feudal system, when the vassal was in minority, the superior exercised the right and enjoyed the casualty of ward, until (in male heirs) the vassal attained majority. The right of ward ceased sooner than this if the vassal committed treason, on which the lands fell by forfeiture to the Crown. Persons were considered capable of treason when they were "*capaces doli*, that is (says Erskine), according to the general opinion, at the age of sixteen." In our criminal courts, culprits are judged to be *capaces doli*, and are punished for their misdeeds long before they have attained that age.

Capiendo securitatem pro duplicatione feudifirmae.—By taking caution for the payment of a double of the feu-duty.

This was a clause formerly inserted in precepts from Chancery for entering an heir, by which it was enjoined that caution should be taken for payment of a double of the feu in name of relief-duty, where this had not been expressly stipulated for in the investiture. It was at one time a question whether relief was exigible in feu-holdings, unless specially stipulated; and this clause was inserted to ensure the payment of relief to the Crown. "The casualty of relief is (now) payable by an heir, both in Crown holdings and in feus held of subject superiors, whether stipulated in the investiture or not." (Menzie's Lectures, 505.)

Capitis diminutio.—A change or diminution of status. Three elements went to make up the status of a Roman citizen, viz.: liberty, citizenship, and family. To lose the first, by being taken captive in war, or otherwise becoming a slave, involved the loss of the whole three; for a slave was not a citizen, and belonged to no family. This was therefore called the *maxima* (or greatest) *diminutio capitis*. The loss of the second, called the *media* (or lesser) *diminutio capitis*, took place when the rights of citizenship were withdrawn, or when a citizen was sent into exile; this involved the loss of the third but left the first untouched. The third was lost when a person changed his family, by adoption, adrogation, or otherwise, and as this did not affect his liberty or his citizenship, it was called the *minima* (or least) *capitis diminutio*. It is not within the purpose of this work to explain how such loss might, in certain cases be retrieved; or the civil effects of the different *diminutiones*, otherwise such explanations might have been entered upon, as being not without interest. The reader, however, may consult Just. Inst., B. 1, T. 16, and the Dig., B. 4, T. 5.

Casus amissionis.—The occasion or circumstances of the loss. Where a writ has been lost or destroyed, its contents may be proved by an action brought before the Court of Session for that purpose, called an action for proving the tenor, a decree in which comes into the place of the lost document. Two points require to be proved in such action, namely, the particular accident by which the document was lost or destroyed, (termed technically the *casus amissionis*,) and the contents of the document; the nature and extent of the ex-

planation and evidence necessary under the first point being somewhat different in different cases. If the lost document be, for example, a sasine, or other deed necessary to give a complete title to a purchaser, the Court will not require the same strict evidence as it would in a case where the lost document was a bill or bond, the obligation under which would be restored by the decree of proving the tenor. In the former case a more general statement of the *casus* would be received —it has been thought that to libel a mere *casus fortuitus* would be enough—but in the latter the evidence must be very explicit, because the document of debt might have been destroyed by the creditor with the view of discharging the obligation, which he subsequently attempted by this action to restore.

Casus fortuitus.—An accident. If an article is hired for a special purpose, and while being used for that purpose is deteriorated or destroyed, the lessor must bear the loss; but if the lessee shall use it for another purpose, he becomes liable for any loss or deterioration, even when occasioned by accident.

Casus incogitati.—Circumstances unthought of, unprovided for. Where questions arise regarding which there is no rule of law, they are decided according to rules drawn by analogy, or on equitable grounds. (Stair, B. 1, T. 1, § 6.)

Casus insolitus.—An unusual circumstance or event.

Casus omissus pro omisso habendus est.—A case (or class of cases) omitted is to be held as (intentionally) omitted. This is a rule to be observed in the construction of statutes, and in considering their applicability to certain cases analogous to the cases therein provided for. An illustration of this phrase will be found in Stair, B. 3, T. 2, § 49. See *Enumeratio unius*, &c.

Causa cognita.—The case having been inquired into; the facts being ascertained. Some orders of Court are pronounced without any inquiry, others are only pronounced when the facts are before the Judge. Formerly, inhibitions were not granted except *causa cognita* (although a different rule now prevails), because they imposed a restraint on the full exercise of the rights of property; and in our own time bills of suspension are not passed, decrees of divorce are not granted, except on inquiry into the facts, and cause shown warranting such orders.

Causa data causa non secuta.—The consideration having failed. Where a sum of money has been paid in consideration of something to be done or procured by the receiver of it, it may be recovered on this ground, where the act is not performed, or the thing not procured in consideration of which the payment was made. Thus provision made, or money paid in contemplation of a marriage, must be restored if the event does not take place; or money paid in purchase of a certain subject can be recovered on this ground, if the seller fail in delivery.

Causa debendi.—The grounds of debt.

Causa et modus transferendi dominii.—The reason and the manner of transferring property. The chief mode by which property in the possession of one person is acquired by another, is tradition or delivery. Tradition, to be effectual in passing the property, must contain two elements: it must contain the intention of the owner to convey, which is technically termed the *causa*, or the *titulus*, and the actual delivery, which is termed the *modus*. Without the first there could be no effectual tradition, because the owner had no intention of depriving himself of the property—he had given no valid consent: without the second, there was no passing of the property, according to the maxim *qui cedet et retinet nihil agit*. It must be remarked, however, in regard to the preceding observation, that delivery is not in every case now necessary to pass the property in movables. If purchased, the right of property passes to the purchaser, although the goods are not actually delivered to him. See the Mercantile Amendment Act, 19 and 20 Vict., cap. 60, and also an important decision on its construction,—*Harvey* v. *Wyper*, 27th Feb. 1861.

Cautio Muciana.—A kind of security given by legatees under the Roman law, deriving its name from its author. When a legacy was bequeathed, on condition that the legatee should abstain from doing some particular act, he received the legacy, on finding caution (the *cautio muciana*) that he would observe and fulfil the condition, or failing which, that he would restore all that he had received, with its fruits or interest. Such a condition would have had the effect of suspending the vesting of the legacy until the legatee's death, because until then it could not be made certain that he would abstain from

the specified act; and this *cautio* was introduced for the purpose of securing the fulfilment of the suspensive condition, and at same time allowing the legatee to derive some benefit from the legacy during his life.

Cautio usufructuaria.—The caution given by a usufructuary to the heir, that he would enjoy the subject without abusing or injuring it, and restore it at the expiration of the usufruct. A right of usufruct was something similar to the right known in our law as liferent, but there are some differences between the two rights; for example, a usufruct was lost by the usufructuary undergoing the *maxima* or *media diminutio capitis:* with us the loss of liberty or citizenship would not extinguish a liferent right.

Caveat emptor.—Let the buyer beware. Where a purchaser has himself seen and examined the subject of his purchase, he will not, on this rule, be entitled afterwards to repudiate the transaction on the ground of patent fault, unless he can prove fraud on the part of the seller. If the defect be latent, and such as he could not have discovered by examination, the rule does not apply; nor, of course, does it apply where the buyer has not seen the subject, as in the case of purchase by sample.

Census.—A subsidy or tax. This name was also given to the valuations of lands, made in Scotland at different times, with the view of ascertaining the proportion they should respectively bear of the taxes imposed, and for ascertaining the rights of superiors under their casualties. See *Antiquus et novus extentus.*

Certiorari.—An English writ, by which a cause is removed from an inferior to a superior court, equivalent to a Scotch advocation.

Certum an et quantum debeatur.—Is there a debt due at all, and what is its amount? These two things must be clear with regard to an alleged debt before it can be pled in compensation. In legal phraseology, the debt must be liquid before it can found such a plea. See the case of *Monro,* 14th May 1823, where the plea was repelled on the ground of its not being certain whether the defender was entitled to that on which his plea was founded; and the case of *Mowat,* 29th November 1828, where the extent of the claim not having been ascertained, the plea was also repelled.

Certum est quod certum reddi potest.—That is certain which can be made certain. This may be illustrated by a reference to the law applicable to the contract of sale. It is essential to that contract that there shall be a certain price agreed upon for some specific subject, but it is not necessary that such price shall be fixed at the time by the parties. It is enough if that price can be made certain and definite by a reference to some determinate standard, by which it may be fixed beyond question. Such as the fiars-prices, or the award of a third party; or the price may be sufficiently fixed by arranging it at so much per pound, the subject being unweighed, or so much per foot, the subject being unmeasured.

Cessio bonorum.—A surrender of goods, or estate. This is the name of a legal process well known in Scotland. Originally it was introduced as a remedy for the evils necessarily consequent upon a lengthened imprisonment, and could only be pursued by one in actual confinement; for (says Erskine) "it is in itself incongruous, and might be of bad example, that one should claim the privilege of personal liberty who is not truly deprived of it." It is not now necessary that a debtor shall have suffered imprisonment to entitle him to the benefit of this process, but it is sufficient that he is liable to be imprisoned. A decree of cessio protects merely the person of the debtor, and it is never obtained without his making a full surrender of his estate. It does not operate as a discharge of his debts, because any property he may afterwards acquire is subject to the diligence of those who were his creditors at the time of cessio being granted. Nor is the debtor entitled to retain out of such subsequent acquisition that which is necessary for his maintenance. He has no *beneficium competentiæ*. Under the Roman law, a debtor had such a *beneficium* out of property acquired subsequent to the surrender of his whole estate. The proceedings under this process are now regulated by the Act 6 and 7 Will. IV., cap. 56.

Chirographum.—A bond, bill, or other written document of debt.

Chirographum apud debitorem repertum presumitur solutum.—A bond, &c. found in possession of the debtor is presumed to have been settled or discharged. "This presumption holds, not only where the ground of debt is personal, *ex. gr.*,

a bill or moveable bond, but in heritable bonds, even when they are perfected by seisin." (Ersk. B. 3, T. 4, § 5).

Circum sacra.—About or concerning sacred things. The civil courts have a certain jurisdiction in sacred (or rather, and more correctly, ecclesiastical) matters, as in questions of presentation by a patron; but it has no jurisdiction *in sacris*, i.e., such questions as ecclesiastical discipline, or questions of doctrine. In such questions the church has supreme jurisdiction. See the case of *Lockhart*, 5th July 1851, 13 D.

Citra causæ cognitionem.—Without investigating the cause. Formerly all interdiction was judicial, and proceeded upon an investigation of the facts, and on its necessity or expediency being made out to the satisfaction of the Court. No other kind of interdiction was allowed, but voluntary interdiction, without such investigation, was afterwards admitted.

Civilis ratio civilia jura corrumpere potest naturalia non vero utique.—Civil or legal rights, obligations, or laws, may be abrogated for a civil or legal reason, but never natural ones. The common law does not impose upon a father the duty of educating his child, nor upon a brother the duty of supporting a brother or sister, but that does not make them less binding moral and natural obligations on them respectively.

Civiliter mortuus.—Civilly dead; dead to civil rights. An outlaw is said to be in this position.

Civitas.—A state having power to make and enforce laws for the government of its subjects. This is the name also given in the civil law to the second of the three elements (citizenship) necessary to the complete status of a Roman citizen.

Civitatis amissio.—Loss of citizenship. See *Cap. diminutio.*

Clare constat.—It clearly appears. This is the name of a writ granted by a superior in favour of the heir of a deceased vassal, granting warrant for his infeftment and entry in the lands, deriving its name from the declaration with which it opens, that from authentic documents laid before the superior, it *clearly appears* that the grantee is the heir. A superior can grant such a writ in favour of no one but an heir, and the warrant it contains for infeftment is so purely personal

that it cannot be assigned unexecuted. The superior may grant this precept upon his own knowledge of the heirship, or in his option may require production of a service to show this.

Clausula codicillaris.—A codicillary clause. Under the Roman law, wills or testaments, to be valid, required certain solemnities, which were not necessary to the validity of codicils, and it was, therefore, not unusual for the testator to add to his testament an express clause to the effect that, if his testament should be held invalid as a testament, it should take effect as a codicil. This is what commentators call the codicillary clause. The chief difference between a testament and codicil was this, that in the latter, an heir properly so called could not be nominated. For a historical narrative of the introduction of codicils, see Just. Inst. B. 2, T. 5, Pr.

Clausula tenoris.—The clause of the tenure. The name formerly given to the clause in a charter setting forth the nature of the tenure, now called the *tenendas*.

Cognitionis causa tantum.—For the purpose merely of ascertaining or constituting a debt against the estate, not against the person. This is the name given to an action raised by the creditor of a deceased debtor for the purpose of constituting his debt. Decree in such an action is necessary before the creditor can adjudge the heritage of his debtor, or compel his executor to make payment of the amount. It derives its name from the purpose which it is intended to effect, namely, to have the amount of the debt ascertained or cognosced.

Collatio bonorum.—Collation of goods. Collation is a provision of the Scotch law, whereby an heir, on renouncing his right to the heritage of the deceased, and allowing it to form a part of the general estate, becomes entitled to an equal share of that estate with the next of kin. The heir cannot be compelled to collate, but when the heritable succession is small, and the moveable succession large, it is his interest, and he cannot be prevented from doing so. In collation, the heir is bound to give up whatever heritage he succeeds to through his ancestor; but where he succeeds to property as heir of provision, not being *alioqui successurus*, he can claim share of the moveables without collating property so derived. Neither is the heir bound to collate presents given, or advances

made to him by the deceased during life. Under the Roman law, the heir desiring to collate, required to bring into hotch-pot whatever he had received by gift out of the estate during the deceased's lifetime.

Collegium.—A corporate body, such as a guild of a trade; cities were also called *collegia* in the Roman law. Such corporate bodies duly constituted, can acquire and administer property like individuals, and their endurance never ceases. In England there is a kind of corporation known as corporation-sole, of which the highest example is the sovereign, who is supposed never to die, *Rex nunquam moritur.* A corporation is sometime termed an *universitas.*

Colonus partiarius.—A *colonus* was a farmer or husbandman holding his land as tenant for a money payment; a *colonus partiarius* was a tenant who, instead of money, paid in return to his landlord a certain stipulated proportion of the produce of the lands.

Comes.—An Earl; an ancient Crown officer holding territorial jurisdiction similar to that of a Sheriff.

Comitas legum.—Comity of laws; being that courtesy which the laws of one country shows to the laws of another in questions in which the laws of either may be involved. This comity is not, however, extended to any case where the laws of the foreign country are contrary to the known policy, or prejudicial to the interests of the country in which the question arises and has to be decided.

Commixtio.—Commixture. Property is sometimes acquired by accession, and commixtion is one of the forms in which it may be so acquired. Commixtion is the term properly applied to the commingling of solids, where the particles of the different substances do not amalgamate; confusion is the term applicable to the mixture of liquids.

Commodatum.—Commodate; a species of loan in which the identical thing lent is to be returned to the lender. It is called commodate, because it is *commodo datum*, given as a convenience or favour. See *Actio commodati.*

Commodatum æstimatum.—A valued commodate. In the ordinary case the borrower was not liable for the subject lent if it perished without his fault; it perished to the owner. But in *commodatum æstimatum*, a value was put on the sub-

ject, and the borrower, if unable to return the subject itself, was bound to pay the valued price.

Commune forum.—The common forum; the Court having general jurisdiction, as, in Scotland, the Court of Session.

Communes reipublicæ (civitatis) sponsiones.—The obligations common to all the members of a state, and which constitute its laws.

Communi dividundo.—See *Actio com. div.*

Communia.—Commons, common muirs. These properties are generally the property of one person or corporation, in which many people have a right of servitude. This right of servitude differs from a right of commonty, inasmuch as the holder of the latter right has a title to sue for the division of the common subject, which the holder of a mere servitude has not. *Gall*, 31st May 1810, F.C.

Communia precepta.—Common precepts or rules, which constitute the laws of a state, and are binding upon all its subjects.

Communibus annis.—On an average of years; taking one year with another.

Communio bonorum.—Community of goods. This relates to the moveable subjects belonging in common to husband and wife, and comprehends all moveable property belonging to either at the time of the marriage or subsequently acquired. The husband has the full and uncontrolled administration of the goods in communion, except where his right of administration has been expressly excluded; and with regard to those goods which form the paraphernalia of the wife, there is an implied exclusion of his right. As to the rights of parties and their representatives in the goods in communion, see the Act 18 and 19 Vict. cap. 23.

Communis error.—Common or general error. When an erroneous practice has become general and prevailed for a considerable period, and especially where the parties to some transaction have depended upon the prevailing practice as correct, the Court will not give effect to any objection or defence founded upon it. The maxim *communis error facit jus* (common error makes a law) has then application. It is necessary, however, that the error be general and of long standing. See as an instance of this the case of *Beattie*, 22d May 1830.

Communis patria.—The common country. Under the old diligence of apprising, directed against heritable rights, the messenger executing the diligence, held his court in the head borough of the shire where the lands lay, but afterwards it became the practice to hold these courts in Edinburgh as *communis patria* to all Scotland.

Comparatio literarum.—A comparison of handwritings. This is resorted to as a mode of proof where it is essential to the question at issue to ascertain whether a certain document is, or is not, in the handwriting of a certain person. Thus, in an action for libel, it would be admitted to show by the handwriting that the libel was written by the defender. It is also resorted to in cases of deeds sought to be reduced on the ground that the signature to the challenged deed, is not the signature, or not the unaided signature of the party who bears to have subscribed it. But it was most frequently adopted in cases of forgery, where it was adduced for the purpose of proving that the forged signature was not that of the person whose signature it bore to be: and to this effect such evidence used to receive great weight. It was not considered so conclusive when adduced to prove that the forged signature was the handwriting of the panel. This kind of evidence does not now receive much weight, if otherwise unsupported, in cases of forgery. It was found that any prisoner could get as many witnesses to express an opinion favourable to his case, as the prosecutor could adduce in support of his view, and the conflicting testimony so procured, while negativing itself, only led to difficulties which were rather to be avoided. Besides, as such evidence was at the best but a matter of individual opinion, it was not thought satisfactory on such slender ground to convict a prisoner of a charge involving consequences so serious. Accordingly, the evidence of engravers, &c., on this point is not now received, nor is any one's evidence received which is based on a mere comparison of letters. This is left to be judged of by the jury, along with the whole other circumstances of the case.

Conatus.—An endeavour or attempt. The mere attempt to commit a crime is punished by our law, although not generally with the same severity, as if the crime attempted had been perpetrated. It more frequently takes the form of an aggravation of a charge, as where assault is libelled with intent.

or attempting, to commit murder, in which case the attempt, if established by the acts or words of the panel, will have the effect of increasing the punishment for the assault. The administration of drugs with the intent to procure abortion, is a statutory crime, and punishment follows, even though the attempt proved unsuccessful.

Concursus debiti et crediti.—A concourse or concurrence of debt and credit. This is necessary to found a plea of compensation, for the parties must be debtor and creditor, each in his own right, and at the same time. Thus, if A sue B for payment of a debt due by him, B may plead in compensation a debt due to him by A, and here there is the necessary concurrence. But, if the firm of which A is a partner suing B for a debt due by him to them, be met by the plea of compensation by B, on the ground of a private debt due by A, the plea will not be sustained, for there is no *concursus;* a company being regarded by the law as a separate person.

Condictio.—A personal action was so called in the Roman law, as opposed to the *vindicatio* or real action. This personal action arose from a *jus ad rem,* and could only be brought against the person underlying the obligation. Thus if the same subject had been sold to two different persons, each had a *jus ad rem,* and on its delivery to one of them, the other had an action personal against the seller for the value, but no claim against the other purchaser who held possession. A *vindicatio,* was for the recovery of the thing itself, arising from a *jus in re,* and was alway directed against the holder of the subject. So, if any thing was stolen, its property could be vindicated as against the holder, even if an onerous purchaser; and although a *condictio* was competent against the thief, the *vindicatio* could only be brought against the person in actual possession of the stolen property.

Condictio indebiti.—A personal action adopted by the Scotch from the Roman law, for repetition of that which has been paid under an erroneous belief of obligation. If in the belief that a debt is due, one person pays to another a sum of money, it may be recovered on showing that no such debt existed, and if there be no bar to the recovery, such as a natural obligation. It is necessary to distinguish between money paid through an error in fact, and an error in law. *Condictio indebiti* may be founded on the former, but (although it has

been allowed in Scotland) it is scarcely thought can be founded on the latter. See the case of *Wilson*, decided in the House of Lords, 7th Dec. 1830, 4 W. and S.; and the case of *Dickson*, 19th Feb. 1854.

Condictio ob turpem causam.—A personal action for recovery of money paid on account of a dishonourable act. This action is mentioned by Erskine, but is scarcely otherwise known in our law. It will not lie at the instance of a person who was himself involved in the turpitude; for as turpitude bars action for implement of an obligation, so likewise does it bar action for restitution when implement has been made.

Conductor.—Lessee. In a contract of hiring, the conductor is he who pays the stipulated consideration for the subject let.

Confirmatio ad omissa vel male appretiata.—Confirmation by an executor to subjects omitted or undervalued in an inventory previously given up. See *Ad omissa.*

Confusio.—Confusion; a kind of specification, and properly applicable to the commingling of liquids. See *Commixtio.* Confusion is also one of the modes in which an obligation is extinguished. Thus, if a debtor succeeds to, or otherwise acquires the right of his creditor, his debt is extinguished *confusione*, because he then unites in his own person both debtor and creditor. Again, if the proprietor of the servient becomes also the proprietor of the dominant tenement, the servitude is extinguished *confusione.*

Conjunctio animorum.—The conjunct consent of parties, essential to the contract of marriage.

Conscientia illæsa.—Literally, an unhurt or unviolated conscience, but in legal phraseology, synonymous with *bona fides.*

Conscientia rei alienæ.—The knowledge that the subject possessed is the property of another. Such knowledge puts the actual possessor in *mala fide*, and renders him liable for violent profits; and it is immaterial whence this information has been derived. In the ordinary case the possessor's knowledge is presumed to commence when the proprietor raises action to vindicate his right, for, by this measure, the possessor is called upon to consider carefully the nature and strength of the title on which he holds possession.

Consensus non concubitus facit matrimonium.—Consent, not sexual intercourse, constitutes marriage. As in all other con-

sensual contracts, the consent must be free and voluntary; and this having been given, nothing farther is necessary to constitute marriage. There is one case in which the law presumes consent; namely, where a promise of marriage has been followed by sexual intercourse. For although a promise to marry in the ordinary case only founds an action for damages in the event of its being unfulfilled, yet, where upon such promise, their follows carnal intercourse, the law presumes the consent to marriage to have been then given. But it must be shown that the intercourse was dependent on the promise, and that in reliance on it alone the woman yielded her person. The promise must be absolute, and not dependent upon any contingent event. See a careful review of the whole cases on this point in the case of *Monteith*, 5th March 1844.

Consortium vitæ.—Cohabitation; a mutual obligation undertaken by the parties entering into a marriage to live together, which may be enforced by an action of adherence.

Constat de persona.—It is clear as to the person meant. A false designation will not always vitiate a writing where there is no doubt as to the person designed. *Muir*, 10th July 1845. Such designation, however, must be merely expository, for in other circumstances the rule will not apply.

Consuetudines feudorum.—A compilation made in the twelfth century of the various rules and customs by which all differences between vassals and their superiors were decided. The work is also known as the Book of the Feus.

Consuetudo est optima legum interpres.—Custom is the best interpreter of laws. Custom not only interprets laws, but, in Scotland, can constitute or abrogate a law; in either case, however, the custom depended upon must be universal.

Consuetudo pro lege servatur.—Custom is regarded as law. All law (not being statute law) is founded upon custom, and obtains thus the name of consuetudinary or common law.

Contra bonos mores.—Against morality. Any obligation or undertaking of which this may be said will not be given effect to by the law. Thus a bond given for payment of the wages of prostitution cannot be enforced, nor can decree be obtained for money lost or won at gambling, betting, &c. Smuggling transactions, and all rights and obligations arising therefrom, also fall within this category. The sale of the hope of his succession by an heir during his ancestor's life (called

the *pactum corvinum*) was held to be *contra bonos mores* under the Roman law, but it is not so regarded by the law of Scotland.

Contra executionem.—Against execution. All decrees are granted with an implied reservation in favour of the defender of all objections competent to him against the manner and extent of execution to follow upon them.

Contra fidem tabularum nuptialium.—Against the good faith of the marriage contract. Provisions in a marriage contract in favour of the children of the marriage are effectual against the father's deeds, and any disposition or conveyance of lands so vested in the children is reducible. The father cannot even impose restrictions upon the rights of the children, if they are contrary to the provisions of the marriage settlement. *Ewen's Trustees*, 15 Jan. 1824.

Contra hereditatem jacentem.—Against a succession which the heir has not taken up. A creditor of the deceased is so entitled to proceed. When an heir takes up a succession devolving upon him, he renders himself liable for his ancestor's debts; but in the event of his not doing so, the law provides a mode (by adjudication, &c.) by which the creditor may proceed against the estate of his deceased debtor for payment of his debt.

Contra non producta.—Against things not produced. In actions of reduction the defenders are called upon to produce the challenged document, that it may be reduced and cancelled, and an order is always pronounced upon the defender to do this, or, as it is technically called, to satisfy production. If he fails to do so, decree of certification *contra non producta* passes against him, the effect of which is that the challenged deed is held to be void.

Contra non valentem agere non currit prescriptio.—Prescription does not run against one who is not able to act in defence of his rights. Prescription, consequently, does not run against a minor or pupil; nor against an insane person, nor one who is prevented defending his right by imprisonment abroad. But absence as an outlaw does not bar the currency of prescription, for in that case the outlaw has lost all his legal privileges. See *Anni utiles*.

Contra omnes mortales.—Against all mortals; the form

in which absolute warrandice is sometimes expressed. There are three kinds of personal warrandice, viz., absolute, from fact and deed, and simple. Absolute warrandice is when the seller of the subject warrants it to the purchaser "at all hands and against all mortals," or "against all deadly as law will," and under this he is liable to the purchaser if eviction take place from any cause whatever. Warrandice from fact and deed is a warranty given merely against the acts of the seller, either past or future, and he is only liable in the event of eviction on account of a breach of this warrandice. Simple warrandice only regards the future acts of the seller, and means that the seller will do nothing in prejudice of his conveyance to the purchaser; but this kind of warrandice is now almost unknown in practice.

Contra proferentem.—Against the person from whom it proceeds (as in the case of a deed); or against the person advancing it (as in the case of a plea). See *Verba sunt*, &c.

Contra spolium.—Against the spoil. There was a real action against the spoil, or things spulzied, for their recovery, even from *bona fide* purchasers.

Contractus bonæ fidei, et stricti juris.—Contracts of good faith, and of strict law. Such a distinction was drawn between contracts by the Roman law, but it is a distinction scarcely regarded by the law of Scotland. Contracts of good faith were those in which the extent of each party's obligation was determined by equity and good faith; in contracts of strict law, the obligations of parties were determined by the strict terms of the agreement. In Scotland, while contracts will be decided upon according to their terms, yet these terms always receive a fair and equitable construction.

Contrectatæ.—Things meddled with; as by a thief, who feloniously intermeddles with the property of another.

Contrectatio rei alienæ.—Intermeddling with the property of another; theft.

Copia peritorum.—Abundance of skilful lawyers.

Copula.—Carnal intercourse, which following upon and in consequence of a promise of marriage, constitutes marriage.

Correi debendi.—Co-obligants for a debt. Under the Roman law the co-obligant was entitled to the privileges of a cautioner, except where the obligation was for the delivery of a special subject. He could adject conditions to his obliga-

tion which were binding upon the stipulator if accepted. In Scotland, if one person binds himself, not as cautioner, but as principal debtor and co-obligant with another, he forfeits the rights of a cautioner, except as in a question between him and the person for whom he became bound. As regards the creditor, the co-obligant stands in the same position as the principal debtor.

Correi credendi.—Joint creditors. When a bill or bond is granted in favour of two or more persons, or where two or more succeed to the right of some obligation, as, for example, heirs-portioners, they have each a right to a share. The debt cannot be sued for, or discharged, or assigned by any one of them, although each of them may adopt either of these measures as regards his own proportion. A full right to sue, discharge, or assign, may, however, be vested by agreement in each of the co-creditors.

Creditor dominii.—The creditor of the subject; the person having the right of property in it. In commodate the lender is creditor of the subject, and on the bankruptcy of the borrower may vindicate his right of property and recover the subject itself, whereas in mutuum the lender is merely a personal creditor of the borrower, and is only entitled to rank with his other creditors, and obtain a dividend on the value of the subject lent.

Crimen dolo contrahitur.—Crime is contracted (or committed) through dole. Dole, which is the evil or felonious intention, is essential to crime, and where this is wanting there can be no crime and no punishment. To destroy life is not murder where it has been accidental or unintended; nor is the mere occupancy of a neighbour's goods theft, unless there be felonious intent. Dole is presumed in a greater or less extent from the circumstances of each particular act.

Crimen falsi.—The crime of falsehood; a generic term including several crimes known to our law, which consist in falsehood, or fraudulent mutation or suppression of the truth to the prejudice of another. Under this class may be ranked forgery, falsehood fraud and wilful imposition, perjury, conspiracy, use of false weights and measures, &c. Under the Roman law, such crimes as fell within this class were punished by loss of citizenship, which was regarded by them as capital

punishment; some of them were punished capitally by the law of Scotland until recently.

Crimen majestatis.—Crime committed against the crown; treason.

Crimen repetundarum.—The crime of taking money unjustly for an unjust purpose when in office. Under the Roman law, all judges and magistrates who accepted bribes to pervert judgment, or the due administration of justice, were said to be guilty of this crime; the punishment of which was generally banishment, but was sometimes, according to the circumstances, more severe. In Scotland the offence is known as baratry or bribery. See *Baratriam*, &c,

Crimina extraordinaria.—Extraordinary crimes. This name was given, in the Roman law, to these acts done in violation of a law to which no fixed penalty was annexed, the penalty or punishment being in the discretion of the judge. Although in Scotland there is no class of crimes bearing this name, there are acts of a similar character visited by penalties, and regarded as crimes. Such, for example, are breaches of interdict and sequestration.

Crimina morte extinguuntur.—Crimes are extinguished by the death of the criminal. His death will not, however, extinguish them *ad civilem effectum*, for any claim thence arising will transmit against his heirs, if there has been litis-contestation before his death.

Cujus est commodum ejus debet esse periculum.—He who reaps the advantage should bear the risk. On the principle of this maxim the risk of a subject purchased, but still in the hands of the seller, lies with the purchaser. As he reaps any advantage to be derived from the subject, either by accretion or otherwise, so he must bear the risk of loss through deterioration or accident. This principle is not, however, of universal application, for it will be remembered that in commodate, the borrower, who has all the advantage, bears none of the risk attendant upon the subject. Its deterioration, or accidental loss, falls upon the lender, the owner of the subject, according to the maxim *res perit suo domino*. The same principle is involved in the following maxim.

Cujus est dominium ejus est periculum.—The risk lies upon the owner of the subject. In commodate, in deposit, in pledge, in location, and other contracts, the risk lies with the

owner, who bears the loss accidentally occasioned, or any deterioration arising from accident or ordinary use. Injury done to the subject, through the fault of the person in actual possession, must be made good to the owner; for such injury is not one of the risks which he runs, he being entitled to rely on the care and ordinary skill of the actual possessor.

Cujus est solum, ejus est usque ad cœlum.—He who is proprietor of land is proprietor also of everything on it. All buildings, all natural fruits, and everything above as well as below the surface, belong to the owner of the land. See *A cœlo, &c.*

Cujus hæredibus maxime prospicitur.—Of him whose heirs are chiefly regarded. This is a rule of construction to be attended to in ascertaining from the terms of a destination, in whom the fee of a property is vested, the ordinary rule being, that he is the fiar whose heirs are preferred. Thus, a conveyance to "A and B jointly, and the heirs of B," gives A merely a joint right of liferent, and gives B the fee. Under such a destination B is so absolutely the fiar that his rights cannot be impaired by any acts, even onerous, of A, who is held, as we have said, to be a liferenter. In construing destinations to husband and wife this rule must be applied with care, or rather, care must be taken, in ascertaining from the terms used according to their technical signification, whose heirs are preferred; for if the heirs of either be preferred in a manner inconsistent with any doubt, then the rule may be as surely applied in the case of such deeds as in any other. But where a husband, for example, dispones his own property to himself and to his wife in conjunct fee and liferent, and their heirs in fee, the husband remains sole fiar, and his wife has merely a liferent, "their heirs" being understood as the husband's heirs only. Under a similar destination, if the property was that of the wife and not of the husband, he merely obtains a liferent while she remains absolute fiar; for in these cases, unless the presumption is elided by express provision, the fee is presumed to be in the spouse from whom, or from whose friends, the subject proceeded.

Culpa.—Fault; negligence. Of this there are three degrees, viz., *culpa lata*, gross fault or carelessness, which the law regards as dole; *culpa levis*, that degree of negligence

which a person may be guilty of, even when ordinarily attentive to his own affairs; and *culpa levissima*, the slightest degree of fault or negligence, which may be fallen into by one who manages his affairs with the greatest attention and prudence. The degree of diligence for which persons are liable depends upon the nature of the contract under which the obligation for the diligence arises. Thus, in the contract of deposit, which is purely for the benefit of the depositor, and confers no advantage upon the depositary, the latter is only liable for *culpa lata*. Whereas, in the contract of commodate, the borrower, who has the sole advantage by the loan, is liable for *culpa levissima;* and in contracts where both parties reap an advantage—as in location, where the one has the use of the article lent, and the other the hire paid for such use—each party is liable for the middle degree of diligence, *culpa levis*, or (as it is often termed) *culpa*. The general rule in regard to diligence is, that where both parties to the contract are advantaged, each is liable for the middle degree of diligence; and where only one of the parties is advantaged, that person must bestow the greatest care and attention, and will be liable for the least neglect, *culpa levissima*. Where a person is in possession of a subject under a contract, from which he derives no advantage, he is only liable for *culpa lata*.

Culpa teneat suos auctores.—A fault or delict binds only its authors; so that a husband, although bound in many cases by the acts of his wife, is not responsible for the consequences of any crime or delict committed by her. On the other hand, if a wife, under the compulsion of her husband, commit a crime, or be accessory to the commission of a crime by him, she will be absolved, on the ground of her want of free will in the matter, and the husband, the author of the delict, will alone bear the consequences.

Cultura.—Culture, tillage. Industrial fruits are said to be so derived, in contradistinction to natural fruits, which are said to spring up *sponte*, without artificial or human labour.

Cum astrictis multuris.—With astricted multures. Multures are a proportion of grain paid to the miller for grinding the rest; astricted multures were those paid by the holders of lands which were astricted or thirled to a certain mill, and the right to them was conveyed in the words of the phrase to the pur-

chaser of the mill. Multures paid under thirlage were termed insucken or astricted, and those paid by persons who voluntarily brought their grain to the mill, but who were not thirled to it, were called outsucken. Thirlage, says Professor Bell, "being devised originally as an expedient for indemnifying the builder of a mill for extraordinary outlay in a rude age, has degenerated, in times of more improved manufacture, into a burdensome and inexpedient tax on the produce of land, and is now in a state of gradual extinction." Bell's Prin., § 1017.

Cum aucupationibus, venationibus et piscationibus.—With fowlings, huntings, and fishings. Salmon fishing is the only fishing in the sea of which there is any monopoly, and as salmon are *inter regalia*, the right must flow from the crown. The clause *cum piscationibus*, followed by possession of salmon fishing, is sufficient to establish a right to such fishing. Such a right may be conferred without any grant of adjoining lands. See *Cum piscariis.*

Cum beneficio inventarii.—With the benefit of inventory. See *Beneficium inventarii.*

Cum columbis et columbariis.—With doves and dovecots. The building of pigeon-houses was put under certain restraints by the Act 1617, c. 19. These words are not to be found in any modern charter, and but few of the old pigeon-houses now remain extant in Scotland.

Cum communi pastura.—With common pasturage. This is mere right of servitude, and not a right of commonty. See *Communia.*

Cum cuniculis cunicularíis.—With rabbits and warrens.

Cum curiis earumque exitibus.—With courts, and the results or profits of the same. The courts of the Barons had this difference from the courts of the Sheriffs and Stewarts, which were King's Courts, that the former received all the amercements and other profits of the court, while the latter were responsible for such profits to the king. A conveyance *cum curiis* carried a right to the profits, although they were not specially mentioned.

Cum curiis et bloodwitis.—If a baron disponed part of his barony *cum curiis*, this conferred a limited jurisdiction on the purchaser, empowering him to judge of questions of debt between tenant and tenant, &c.; but if the conveyance was

cum curiis et bloodwitis, it entitled the purchaser to fine for blood. The jurisdiction thus conferred was cumulative only, and did not exclude that of the baron, whose jurisdiction continued over the whole barony.

Cum decimis inclusis et nunquam antea separatis.—With the teinds included, and never before separated. Lands disponed with such a clause as this are exempt from the payment of teinds. Such conveyances seem originally to have flowed from churchmen in right both to the lands and teinds, so that the teinds, being a burden on the lands, became extinguished as it were, by confusion, when combined in the person of the purchaser, who became, by the same deed, proprietor of the lands and titular of the teinds. It must be remembered, however, that a conveyance *cum decimis inclusis* only, will not support the claim of exemption, unless it bear *nunquam antea separatis*, or words of similar import. *Beatson*, 5th Feb. 1812. F. C.

Cum domibus, ædificiis.—With houses, buildings. These words are held to include every erection upon the lands conveyed, but they are not essential; for the conveyance of the lands carries all that is erected upon them, unless specially excluded or reserved.

Cum effectu.—With effect. Prescription does not run against any one, as we have seen above, unless he is able to act in defence of his right *cum effectu*. Under the old feudal system the casualty of ward was not incurred except where the vassal alienated his lands *cum effectu*. Thus, if the vassal was interdicted and disponed without the consent of his interdictors, his conveyance being reducible was not effectual, and the casualty was not incurred.

Cum fabrilibus, brasinis, et brueriis.—With forges, malt-kilns, and breweries. Anciently no vassal could erect such works on his lands without the permission of his superior, but there is now no such restriction on the right of property, unless it be a matter of bargain between the parties, and be inserted in the original charter or feu-contract.

Cum fossa et furca.—With pit and gallows; the expression used in conferring upon Barons the right of pronouncing capital sentence in the Baron Courts. It signified a jurisdiction over felons to punish men by hanging, and women by drowning.

Cum herezeldis.—With herezelds. This expression, still to be found occasionally in old charters, gave the landlord a right to the best horse, ox, or cow, of which a deceased tenant was possessed at the time of his death. The herezeld was not exigible from feuars but from tenants only; but such a right has been long unknown in practice.

Cum libera et plena administratione.—With full and free power of management or administration; such as is given to a factor, an attorney, or a mandatory, entitling him to act for his constituent as he may deem most suitable and advantageous.

Cum libero exitu et introitu.—With free ish and entry.

Cum maritagio.—With the casualty of marriage. This was a casualty of wardholding (now abolished) under which the superior was entitled to payment of a certain sum on the marriage of his ward. When the heir was a female, the superior selected for her a husband, whom she could not refuse except on forfeiture of her property, or as much thereof as was estimated to be the value of the match. When the heir was a male, the consent of his superior to his marriage was required. If such consent was given, it operated as a renunciation of the right of casualty. This consent was often used as a means of extortion, and large sums were paid by the heir for liberty of choice.

Cum molendinis et multuris.—With mills and multures of the same.

Cum nota.—With a mark, or reservation. Formerly, when witnesses were disqualified by reason of agency or partial counsel, &c., it was a frequent practice to admit persons as witnesses who were in some measure chargeable with the disqualification, and especially so where there happened to be a *penuria testium*. They were admitted, however, *cum nota*, that is with a mark to call the attention of the Judge to the extent of agency, &c., which had been proved against them, and with a reservation to him to give such weight to their evidence as under the circumstances he should think proper. In effect, the evidence of a witness admitted *cum nota*, generally received as much weight as the evidence of those who were not so distinguished.

Cum omni causa.—With every profit or advantage. A

depositary is bound to deliver up the subject deposited, with every profit, such as fruits or accessions to the depositor, when demanded. So also is the pledgee bound to deliver the pledge with all its fruits when his claim against the pledger has been satisfied.

Cum onere debitorum defuncti.—Under burden of the deceased's debts. An executor or heir incurs this liability when he enters upon the succession which has opened up to him.

Cum pertinentis.—With pertinents. This includes everything belonging to the lands conveyed; and on such a clause and possession for the prescriptive period, the right of property in ground adjoining may be acquired, except where the original charter containing these words is a bounding charter.

Cum piscariis.—With fishings. The difference between this phrase and *cum piscationibus* is this: that while the latter, with forty years' possession thereon of salmon fishing, will constitute a right thereto, the former (*cum piscariis*) is held as equivalent to an express grant *salmonum piscationibus*, without such prescriptive possession.

Cum silvis.—With woods.

Cum suo onere.—With its burden. Lands resigned *ad remanentiam* remain burdened with any burden legally imposed upon them by the vassal before resignation, and they must be accepted by the superior *cum onere*.

Cum titulo.—With a title.

Cum virginitas vel castitas corrupta restitui non possit.—Since chastity once violated cannot be restored. On this account, because no sufficient recompence can ever be made to a woman who has been violated, and who can never be restored to her inviolate condition, the punishment of rape is proportionately severe. This phrase, quoted from the civil law, gave rise to the question whether rape could be held to have been committed unless complete connection had taken place. It is now settled that such connection is not essential to the crime.

Cura animarum.—The cure of souls; a curacy or cure.

Curator bonis.—The name given to an officer, appointed by the Court on application to that effect, for the preservation or management of an estate which at the time is without any one to manage or superintend it. Most frequently such curators

are appointed to the estates of these persons who through insanity are incapable of attending to their own affairs, but they are also appointed under other circumstances, as, for example, to manage a trust-estate where the trustees have declined to act, or to manage the estate of a person who is abroad.

Curator (datur) rei.—A curator is appointed to the estate; and is in this respect different from a tutor, who is (*datur personæ*) appointed to take care of the person of his ward.

Curia Christianitatis.—A name given to the Ecclesiastical Courts, and especially to the Commissary Court, at the time when it was presided over by the bishops or their vicars.

Currente termino.—During the currency of the term; a phrase used in reference to leases. A poinding of the tenant's effects during the currency of the term may be stopped by the landlord, as it would interfere with his preferable right of hypothec, to preserve which he may sequestrate *currente termino*, in security for the payment of his rent when it becomes due.

Custodiæ causa.—For the purpose of keeping or preserving. Interference with the estate of a deceased, if merely for this purpose, will infer no passive title against the custodier. This is the sole purpose of the contract of deposit, and if the depositary uses the subject (farther than is necessary for its preservation) he will be liable to the depositor for such use. Such use is called in the Roman law *furtum usus* (the theft of use.)

D

Damnosa aut lucrosa.—Injurious or advantageous. To allow the heir to ascertain whether taking up the succession which had devolved upon him would be advantageous or injurious to his interests, the year for deliberation was given,—a period which has been reduced to six months by the Titles to Land Act, 21 and 22 Vict., cap. 76. If he found that it would be *lucrosa*, i.e., make him wealthier, he could enter upon it, but if otherwise it was in his option to renounce.

Damnum.—Harm, injury, loss. Under the Roman law, this word implied only accidental damage; or damage not the result of a legal wrong.

Damnum absque injuria.—Damage inflicted without legal wrong. Damage so inflicted gives rise neither to prosecution *ad vindictam publicam*, nor to action at the instance of the person injured for compensation. Such is damage arising from accident, or from an act lawful in itself, and not performed with any intent or desire to injure. This is distinguished from the *damnum injuria datum* (damage inflicted wrongously), which gives rise in many cases both to civil and criminal prosecution, and always to the former. *Injuria* includes any act that is illegal or unwarrantable, and therefore damage is said to be inflicted wrongously, where it arises from fault or neglect. Damage may thus be inflicted by an animal not kept with due care by its proprietor, and for such damage the proprietor is liable.

Damnum et interesse.—The loss and interest; or, as the words may also be translated, damage, and its issues or consequences. The words are used by Erskine in treating of the

liability of cautioners who become bound to see a specific act performed. Failing performance, the cautioners are liable to the creditors for the *damnum et interesse;* that is, the actual and consequential damage suffered through non-performance on the part of the debtor.

Damnum fatale.—Loss arising from inevitable accident, which human means or prudence could not prevent. All loss, occasioned by the acts of God, is so called, and must be borne by the person on whom the loss or damage has been inflicted.

Damnum infectum.—Damage not yet occasioned, but apprehended. Such is damage threatened to buildings from mining operations below them; or violence threatened against the person. The former may be stopped by interdict, the latter provided against by a petition for lawburrows.

Damnum injuria datum.—Damage or injury culpably inflicted. See *Damnum absque injuria.*

Damnum sine injuria esse potest.—There may be damage or injury inflicted without any act of injustice. This maxim embodies the distinction between damage wrongously or culpably inflicted, for which the perpetrator is liable, and that damage which is accidental, unintentional, and without fault, on account of which no action for compensation will lie.

Dans et retinens nihil dat.—One who gives and yet retains, does not give effectually. The principle of this maxim was absolute, and strictly applied in our law before the passing of the Act 19 and 20 Vict., cap. 20. Until then, the mere purchasing of a subject, without delivery, conferred no right of property on the purchaser, and only bound the seller in a personal obligation to deliver. That statute changed the rule, by providing that the completed contract of sale should have the effect of passing the property without delivery. But there may still be cases where the present maxim will be applicable. For example, if the tenant of a house should sell his furniture to a third person, and still retain possession of it, without any patent and overt act of delivery to the purchaser, in such a case, it is thought, a creditor of the tenant would be entitled to operate diligence against such furniture for payment of his debt, for he was entitled, in allowing the tenant to incur the debt, to rely upon the furniture as a security for payment. A mere assignation to the furniture, or bill of sale, if sufficient

to pass the property of that still retained by the tenant, and to all appearance his own, would give facilities for defrauding creditors, which the law would not recognise or favour. In the case supposed, the purchaser of the furniture would only be entitled to rank with the other creditors for the price he had paid, and with them participate in the division of the debtor's estate, his right being a *jus ad rem*, and not *in re*.

Datus bonis.—Appointed to manage an estate. See *Curator bonis*.

De alode parentum.—Lands descending by inheritance from parents were said to be so acquired, in contradistinction to lands held in feu (*de munere regio*), and to those acquired by a singular title. Subsequently the phrase acquired a more comprehensive signification, as all lands were, in process of time, termed allodial, in which the holder had a right of absolute property, without rendering any service therefor, or recognising any superior therein, and in which he had an unlimited power of disposal. "The term is applied, 1. To the property belonging to the Crown; 2. To the superiorities reserved by the Sovereign; and 3. To churches, churchyards, manses, and glebes, the right of which does not flow from the Crown. To these may be added the udal lands of Orkney, which are held by natural possession, provable by witnesses, without any title in writing." Bell's Dict., *v.* Allodial.

De calumnia.—Of calumny. An oath (called the oath of calumny) was at one time administered to all suitors, under which they were required to affirm their belief that the statements set forth by them in their libel or defences were just and true. This was borrowed from the Roman law, under which this oath was required at a very early period, where it was introduced for the purpose of checking reckless or vexatious litigation. It derived its name from the meaning attached to the word *calumnia*, which Gaius defines as the offence committed by a man, who, in the knowledge that he is acting unjustly, yet institutes an action for the purpose merely of annoying his adversary. (*Qui intelligit non recte se agere, sed vexandi adversarii gratia actionem instituit.*—GAI. iv. 174). In our law, as under the Civil Law, this oath was at one time required of all suitors, but subsequently it was only administered when the adverse party demanded it; and at the present time it is almost unknown in

practice, being confined to cases of divorce, and declarator of nullity of marriage, in which the pursuer is required still to emit it. See an interesting case on this subject, where the question was raised, whether the oath of calumny still exists in our law. *Paul* v. *Laings*, 7th Mar. 1855. 17 D. 604.

De causa in causam.—From one cause to another. This is a kind of prorogation of jurisdiction, intended to confer on a certain judge a jurisdiction which, without the consent of parties, he could not possess. Such prorogation is necessarily very limited in extent. "Prorogation of jurisdiction, from causes of one description to those of a totally different description, is inadmissible. Yet, where the cause is of the same nature with those to which the judge is competent, prorogation is admitted. Thus, where the proper jurisdiction of the judge is confined to causes amounting to a certain value, parties may prorogate the jurisdiction to causes above that value, unless the statute conferring the jurisdiction prohibits it, or expressly limits the jurisdiction." Bell's Dict., *v.* Prorogation.

De die in diem.—From day to day; daily.

De facto.—According to the fact; in point of fact. This is antithetical to *de jure*.

De fide instrumentorum.—As to the genuineness or truthfulness of instruments. This is a question raised frequently in actions of reduction of instruments on the ground of forgery, &c., the proof in which requires to be very ample and distinct. On this point see Menzies' Lectures, 114.

De fideli administratione.—Of faithful administration. An oath bearing this title is emitted by all public functionaries, by judges, advocates, and other legal practitioners; and also by all officers appointed by the Court, such as curators and tutors, under which they engage to be faithful in the performance of all the duties of their office. A breach of this oath, although it gives rise to a civil action for remedy against the consequences, does not involve the penalties of perjury.

De futuro.—Regarding the future; at a future period. This phrase is antithetical to the phrase *de presenti*. A consent to marriage *de presenti* constitutes marriage in itself; a consent *de futuro* does not constitute the contract of marriage, but only gives rise to an action of damages in event of the non-fulfilment of the promise.

De judicio sisti.—See *Judicio, &c.*

De jure.—According to law; or in point of law. This is antithetical to *de facto.*

De jure communi.—According to the provision of the common law. The phrase is similar in import to the preceding one.

De libero homine exhibendo.—For the exhibition or production of a free man. This was a part of the Roman law (Dig., B. 43, T. 29), under which a question of false or illegal imprisonment or detention was determined. If any one detained another as his slave, or deprived him of that liberty of action which was the inherent right of every free man, the detainer, under this law, could be compelled to exhibit and produce the person detained in open court, where his status as freeman or slave was at once determined; and if the detention was declared illegal, he was set at liberty. The application to the judge (the Praetor) for production of the person detained was one of the class *actio popularis*, and could be brought by any citizen, whether immediately interested or not. The writ of *habeas corpus*, in England, is analogous to this action in the Roman law, in so far as it is resorted to by a prisoner to have the legality of his custody determined; but it can only be adopted where the custody is on a judicial warrant, and not, as in the Roman law, where the false imprisonment was by a fellow subject, without any warrant at all. This latter kind of wrong has its remedy at common law, both in England and Scotland.

De liquido in liquidum.—Of a liquid claim against a liquid claim; having reference to the extinction of a claim by compensation or set-off. To entitle a defender to the benefit of such a plea, the claim he advances must be liquid, *i.e.*, ascertained to be due and fixed in extent. If it be otherwise the plea will be repelled. See *Certum an et, &c.*

De lucranda dote.—Of being enriched by the dowry: a paction sometimes made between spouses under the Roman law, whereby a husband became entitled to retain the dowry after his wife's decease, which, in the ordinary case, and without such paction, he was not entitled to do.

De me.—Of me. The technical name given to a base holding. See *A me.*

De momento in momentum.—From moment to moment. The years of minority are thus computed; and, until the last moment of the twenty-one years, any deeds granted or acts done, are done in minority, and liable to all the objections competent on that head. So also are the years of prescription computed. "Prescription runs *de momento in momentum*, and the interruption may be on the last moment of the fortieth year." Bell's Prin., § 622.

De morte antecessoris.—Concerning the death of the ancestor. The brief of inquest, under the old form of service, enquired concerning this, and was therefore called the brief of mortancestry. This name, however, properly and originally belonged to a brief used by the heir for calling into Court the possessor of the ancestor's property, with the view of trying the title under which he possessed. The brief of mortancestry "was purchased by the undoubted heir, even though he had been already served, against the superior of the lands, or against others who had been seised in them upon a title preferable to that of the heir. This last was therefore the ground of a proper action, in which it behoved the heir to cite the person who held the possession from him as a party to the suit." Ersk., B. 3, T. 8, § 62.

De munere regio.—By royal gift. Lands held under feudal tenure were generally described by this phrase, in contradistinction to lands acquired by inheritance or singular title; the name being derived from the fact, that all lands held feu were originally gifted by the Crown to the Barons, in reward for past and future services.

De non alienando.—Concerning the non-alienation of the lands. This clause, prohibiting the sale or alienation of the particular lands specified is common to entails, and essential to their validity, as without it the purpose of the entail can be defeated. It must, to be effectual, be expressly stated, and properly fenced with irritant and resolutive clauses.

De non alienando sine consensu superiorum.—Concerning the non-alienation of the lands without the consent of the superior. This clause, in effect, was at one time common to all charters granted to vassals, and the breach of it incurred the casualty of recognition. But being regarded as hostile to the free use of property, and as a restraint upon the exercise

of the just right of alienation, it was abolished by the Act 20 Geo. II., cap. 50. This enactment, however, does not appear to strike at the clause of pre-emption, which "is intended, not for preserving the feudal influence of the superior (the abolition of which was the object of the Act), but for conferring upon him a valuable right to the re-purchase of the estate, and is legitimate and effectual." Bell's Prin., § 864. See also Duff's Feud. Con., 69; Menzies' Lectures, 574-5, and the cases cited by these authors respectively.

De non contrahendo debitum—Against the contraction of debt. A clause inserted in entails, to prevent the heir burdening the entailed lands with debt, whereby, through the diligence of creditors, the entail might be rendered ineffectual. This prohibition must be expressly stated, and cannot be deduced by implication.

De novo—Of new.

De novodamus—We give of new. The charter (or clause) of novodamus is granted (or inserted in a charter by progress) by the superior in favour of his vassal, where the latter, by loss or otherwise, is unable to produce a sufficient legal title to demand entry. As such charters proceed on no resiggation, and in obedience to no warrant, they are ineffectual if challenged, until the years of prescription have run. *Grieve* v. *Williamson*, 11th Dec. 1760. M. 3022.

De plano—Immediately, summarily, without attention to forms.

De praxi—According to practice.

De presenti—At present, now. See *De futuro*.

De recenti—Recently, recent. In cases of theft before the Justiciary Courts, in which recent possession of the stolen property affords a strong presumptive proof of the prisoner's guilt, the question not unfrequently arises, as to what period of time should be considered *recent*. This has never been positively fixed; but it has been held, that stolen property found in possession of the prisoner two months after the theft had been committed, was not such recent possession as to infer guilt. *John Hannah*, 17th Sept. 1836. 1 Swinton, 289.

De rei gestæ veritate—Of the truth of the fact as stated, or of the transaction. In an action of proving the tenor of a lost deed, the instrumentary witnesses may be not only wit-

witnesses to the existence of the deed, but also to its nature, and sometimes to the truth of its statements. Thus, a witness insert and subscribing to an instrument of sasine under the old form, would be a witness, not only to the existence of the lost instrument, but also to the contents and the truth of the *res gesta, i.e.*, the transaction narrated by it.

De solemnitate.—As a solemnity. There are certain requisites in deeds called solemnities, the want of which invalidate the deed; while there are other parts of a deed which, although commonly inserted, are not essential to validity. Thus the names and designations of the writer and witnesses are solemnities; but the date is not. The reading over of the deed in presence of the granter and witnesses before subscription is not required *de solemnitate*, although a prudent course to follow.

De statu defunctorum.—Concerning the status of the deceased. The older authorities in our law lay it down, that where a person, during his life, enjoyed the status of legitimacy, it should be incompetent to question this judicially after his death (*Stair*, B. 3, T. 3, § 42, and cases there cited); but modern practice has differed from this, and it appears competent to any one having interest to question the legitimacy of the deceased at any time. See Fraser's Dom. Rel. II. 8, and authorities cited.

Debita fundi.—Debts attaching to the soil; such as feuduties, ground-annuals, debts heritably secured, &c.

Debiti et crediti contributio.—A reckoning of debit and credit. The phrase is used in some parts of the civil law as a definition of compensation or set-off.

Debito tempore.—In due or proper time.

Debitor non presumitur donare.—A debtor is not presumed to make a gift to his creditor. So long as the debtor's obligation is unextinguished, any payment made, or money given, or bond or assignation granted by him to his creditor, is not presumed to be in gift, but is presumed to be towards the extinction of the existing obligation. This being merely a legal presumption, it may be redargued by proof of the debtor's intention. See the case of *Balfour*, 10 Mar. 1842, 4 D. 1044, where the maxim was held not to apply, to the effect of extinguishing a debt by a legacy of a much larger amount.

Debitorem locupletem esse.—That the debtor is solvent, or sufficient for the debt. In assigning a debt, the cedent does not warrant (except under special arrangement) that the debtor is able to pay it, but he is always held to warrant *debitum subesse*, that the debt is legally due.

Debitum fructuum.—A debt forming a burden on the fruits of the lands, such as teinds.

Debitum in presenti solvendum in futuro.—A debt now due, but not payable (that is, not prestable) until a future time. Thus a legacy may be due, that is, may vest in the legatee so as to transmit it to his representatives, and yet not be demandable out of the estate of the testator until a time long subsequent. Such debts are called *future debts* in our law, but the term future properly applies to the date of payment alone. See *Dies cedit, &c.*

Debitum reale.—A real debt; a debt affecting the lands, as opposed so that which is merely a personal obligation; a debt heritably secured.

Debitum subesse.—That the debt is due. See *Debitorem, &c.*

Decennalis et triennalis possessor non tenetur docere de titulo.—A possessor for thirteen years is not bound to instruct his title. The benefit of this rule of law is confined to churchmen holding a benefice or living, and partakes more of the character of a legal presumption than of prescription. A clergyman who, for thirteen years, holds possession of a subject as part of his benefice, is presumed to be the rightful possessor, without producing any written title to the subject; but if it can be shewn, from his own title or otherwise, that the subject so possessed is outwith the bounds of his title, his possession will be restricted. The thirteen years' possession gives him no actual title, but only raises a presumption in his favour, that the possession is legal, and throws the *onus* of shewing that the possession is unwarranted on the challenger. The presumption, as we have said, may be elided by a contrary proof.

Deceptis non decipientibus, jura subveniunt.—The laws help or succour persons who are deceived, not those deceiving. The laws afford peculiar protection to minors, on account of their youth and inexperience, and as a check upon others who

might take advantage of that inexperience. But where the minor gives himself out to be major, or acts as if he were, and having incurred liabilities, pleads his minority in defence and as a ground on which his liability should not be enforced, such defence will not be sustained, *Wilkie*, 28 Feb. 1834, 12 S. 506.

Decimæ debentur parocho.—Teinds are due to the parish minister. He cannot be deprived of this right by any alienation which is to have a permanent effect to his prejudice.

Decimæ garbales.—Teind sheaves, *i.e.*, the tenth sheaf of the cut corn, to which the rector of the parish had a right.

Decimæ inclusæ.—See *Cum decimis, &c.*

Decimæ rectoriæ.—Parsonage teinds: which may be described as a tenth of every species of grain raised upon the lands, out of which the teinds are payable, by culture. They are due to the rector or parson, and the right to levy them cannot be lost by prescription.

Decimæ vicariæ.—Vicarage teinds; commonly called the lesser teinds, because payable, not out of grain, but out of the minor products of the land, such as fowls, eggs, butter, wool, &c. These are not drawn, as are parsonage teinds, according to any fixed and general rule, but according to the usage and custom of each benefice or parish. The right to them may be lost *non utendo.*

Decreta.—The name given in the civil law to those decisions pronounced by the Emperor, as supreme judge in cases brought before him. There were three kinds of imperial ordinances or constitutions: 1. *Decreta;* 2. *Rescripta,* instructions, or answers by letter, given by the Emperor to questions put to him on cases which had arisen; and 3. *Edicta,* rules voluntarily made by the Emperor, to meet cases which might arise.

Deductis debitis.—The debts being deducted. This must be done before the extent of any estate or succession can be ascertained. It is for the amount of the estate, less the debts, that trustees or executors are liable to representatives; and it is on the amount of the estate thus ascertained that inventory duty is paid.

Del credere.—An Italian mercantile phrase. It is similar in import to the English word *guarantee,* and with us is understood

to express the obligation undertaken by an agent, who not only sells his principal's goods, but who also guarantees the solvency of the buyer. On account of this guarantee he receives a higher remuneration or per centage on his transactions, which is called a *del credere* commission.

Delectus personæ.—Choice of person to the exclusion of others. This right is implied in the contract of partnership. From the nature of the connection which exists between partners, and the trust which they necessarily place on each other, it is only just that no one should become a partner without the consent of the rest. Accordingly heirs, assignees, and creditors are excluded, in the ordinary case. Under agricultural leases, of the ordinary length of 19 or 21 years, the *delectus personæ* has also free operation; but under longer leases the tenant may, without consent of the landlord (unless his right to do so may be expressly excluded), sublet the farm or assign the lease.

Delegatio.—Delegation is one of the modes of extinguishing obligations, by the substitution of a new debtor for the old, with the consent of the creditor. The new debtor was, in the civil law, called *expromissor*. Delegation is never presumed, and therefore where it is not clear that this was intended, the new obligation will be considered as in corroboration, not extinction, of the old one.

Delegatus non potest delegare.—A delegate cannot devolve the duty or power delegated to him upon another. Thus a Sheriff who, under the Small Debt Act, is directed to take the proof *viva voce* in person, and is only authorised to grant commission to take proof on special cause shewn, cannot, in the ordinary case, delegate to a commissioner the taking of such proof. Nor can a mandatory, by his mandate, devolve upon another the power conferred upon himself. A legal practitioner in the country, authorised by his client to institute certain proceedings before the Supreme Court, and who, in turn, authorises a practitioner in town to institute them, does not violate this rule, because the mandate granted by himself is only in the exercise of the power conferred upon him by the client.

Destinatione.—By destination, or intention. There are two distinct meanings to the term destination, the one popu-

lar, the other technical. The first is sufficiently explained by the following passage from Erskine: "One's collecting of timber, stone, slate, or other materials, for raising any fabric or edifice, is not sufficient to make them heritable *destinatione*, till they be united to the surface of the ground by actual building." (B. 2, T. 2, § 14). The intention of the proprietor, and the purpose for which he destines the material, is here referred to. Technically, that part of a dispositive deed or conveyance which contains the names, or points out the class of persons, who are called in a certain order to the succession, is termed the destination, and an heir *destinatione* is one who succeeds by virtue of that clause.

Dicis causa.—For form's sake. Ersk., B. 3, T. 8, § 89.

Dies cedit, et dies venit.—These words are borrowed from the civil law, and are defined by Ulpian (Dig. B. 50, T. 16, l. 213) as follows: "*Cedere diem* signifies that the money has commenced to be due; *venire diem* signifies that that day has arrived on which the money may be demanded." In Scotch law phraseology, it may be said that *dies cedit* signifies that the right has vested, *dies venit*, that it has become prestable. Where performance of an obligation is postponed to a fixed and certain day, it is said *dies cedit, sed non venit* (the obligation exists, but is not yet prestable); but where the performance is postponed to an uncertain day, and is thus conditional, *dies nec cedit nec venit nisi conditio extiterit* (it is neither due nor prestable until the condition has existed, *i.e.*, been purified).

Dies inceptus pro completo habetur.—A day commenced is held as completed. This phrase, expressing one of the rules of our law as to the computation of time, is not of universal application. Thus, where a question of prescription is at issue, it would not be sufficient that the last day of the forty years had begun, to make it complete. The years of prescription, like the years of minority, are computed *de momento in momentum;* and in such a case, therefore, the principle of the maxim would not apply. While, however, it has not universal, it has very general application, and one or two instances of its application may be merely mentioned. The plea of deathbed is elided if the deceased survived until the morning of the sixtieth day after executing his settlement; a deed

granted by a bankrupt cannot be reduced as a preference, if his estate be not sequestrated, until the morning of the sixtieth day after granting it; and in all cases where the law requires the lapse of "year and day," the period is held to be completed if the "day" has begun.

Dies incertus pro conditione habetur.—An uncertain day is regarded as a condition, *i.e.*, an obligation prestable only on a day which may never come, such as, on attaining majority, is regarded as a conditional obligation, which only comes into effect when the condition is purified.

Dies interpellat pro homine.—Literally, the day interferes or demands for the man. Where fulfilment of an obligation is due on a certain day, the occurrence of the day is of itself deemed a sufficient demand on the part of the creditor, to the effect of putting the debtor *in mora*, and rendering him liable in all its consequences, should he fail on that day in fulfilment.

Diligentia media.—The middle degree of diligence or care, being that which a man of ordinary prudence usually bestows upon his own affairs. See *Culpa*.

Dissimulatione tollitur injuria.—Injury is removed by being passed over or forgiven. Any injury, however slight, or however serious, may be, as regards its civil consequences, completely removed by the forgiveness of the person injured; but if the injury amounts to crime, no forgiveness of the injured person can exclude the criminal consequences, or that which is done *ad vindictam publicam*. Ersk., B. 4, T. 4, § 108.

Do ut des, do ut facias.—I give that you may give; I give that you may do. The Roman jurists divided all innominate contracts (that is all contracts not distinguished by special names) into these four heads: 1. *Do ut des*. 2. *Do ut facias*. 3. *Facio ut des* (I do that you may give.) 4. *Facio ut facias* (I do that you may do.) In the first and second something is given that something may be received or done in return; and in the third and fourth, something is performed that something may be given or done. It is evident that the division is not exhaustive, as there might be, 5. *Do ut non facias* (I give that you may abstain from doing something); and 6. *Facio ut non facias* (I do something that you may abstain).

Dolo circumventus.—Over-reached by fraud. Any one fraudulently taken advantage of will not be bound by the contract to which the fraud gave rise. A deed granted under such circumstances can be reduced. Distinction, however, must be made between this and *errore lapsus*,—between actual fraud, and a mistake on the part of one of the parties not corrected or pointed out by the other.

Dolose.—Deceitfully, fraudulently.

Dolus.—Fraud. There is a distinction between, 1. *Dolus malus*, and 2. *Dolus bonus*, or *solertia*. Where the first has given rise to a contract, or has been successfully used as the means of procuring the execution of a certain deed, an action of reduction of the transaction can be successfully maintained on that ground. The second is not regarded as fraud, but merely that craftiness, or that boasting, which persons use for the purpose of disposing of their goods. Thus the eulogies bestowed by a trader upon his goods with the view of securing a better bargain, or the taking advantage of the buyer's ignorance of any change in the market prices of which he should have been aware with a view of obtaining a better price,—these, and such like acts, amount merely to *dolus bonus* or *solertia*, and do not vitiate the contract. But a false statement, made with the intention of deceiving, on which the buyer was to rely, and in reliance on which he enters into the contract, amounts to *dolus malus*, and vitiates the contract.

Dolus auctoris non nocet successori, nisi in causa lucrativa.—The fraud of the author does not affect the successor, except where the latter acquires by a lucrative title, *i.e.*, gratuitously. Where the fraud is inherent, such as in stolen property, even an onerous holder is affected by the author's fraud; but where the fraud is not so, it does not affect an onerous purchaser or holder. An heir, however, who succeeds gratuitously to his ancestor's estate, represents his ancestor in that fraud, *quoad* its civil effects.

Dolus dans causam contractui.—Fraud giving rise to the contract. If the fraud be such as that without it the engagement would not have taken place, it voids the contract.

Dolus incidens.—Fraud incidental; that is, not affecting the *essentialia* of the contract, but incident to, and as an accompaniment of it, independently of which the parties were engaged. This does not void the contract, "but it will always

void what is effected by the *dolus*." (Lord Mackenzie in *Watt*, 20 Feb. 1846. 8 D. 529).

Dominium.—The name given in the civil law to the right of absolute ownership.

Dominium directum.—The name given to the right vested in a superior; the superiority of lands. It is so called, because at one time it was considered the direct and paramount right in the lands, the vassal's right being regarded as merely a burden upon it. This is a view not now entertained.

Dominium eminens.—The supreme power over property vested in the people, in virtue of which they can, for the purposes of public necessity or utility, compel any proprietor to part with his lands. This is the right exercised in Acts of Parliament, which authorise the purchase of lands by compulsory sale, for the purposes of railways, canals, &c. *Dominium eminens* is sometimes used as equivalent to *dominium directum*.

Dominium non potest esse in pendente.—A fee or right of property cannot be in suspension; *i.e.*, it must always be vested in some one. See the rules of law adopted for preventing the right of property being thus in suspension. Bell's Prin., §§ 1711-15, § 1951.

Dominium utile.—The right of property enjoyed by the vassal, as distinguished from the superiority, and so called because the vassal has the useful enjoyment of the subjects and its fruits.

Dominus directus.—The superior. Ersk., B. 1. T. 7, § 46.

Dominus litis.—The person to whom a suit belongs, and who has the real interest in its decision, deriving the benefit of a favourable, and suffering the consequences of an adverse judgment.

Dominus omnium bonorum.—Proprietor of all moveable goods; as is a husband of all the moveable goods in communion. Stair, B. 3, T. 8, § 46.

Donatio inter virum et uxorem.—Donation between husband and wife. Such donations are revocable by the donor at pleasure, during his or her life. The revocation may be express, as by a deed recalling the donation; or implied, as by the subsequent conveyance of the subject of donation to another person. See *Morte donantis*.

Donatio mortis causa.—A donation made in the view of, and to take effect after the donor's death. The legal presumption is rather in favour of donations being absolute than *mortis causa;* and, consequently, although made in the contemplation of death, if they be irrevocable and delivered, they are held to be simple gifts.

Donatio non presumitur.—Donation is not presumed. Ersk., B. 3, T. 3, § 92.

Donatio propter nuptias.—A donation on account of the marriage. This donation, in the civil law, was that property given by the husband to the wife in security for the return of her dowry (of which, during the marriage, he had the administration,) to herself or her relatives on the dissolution of the marriage. The donation *propter nuptias*, in such event, returned to the husband. In our law, which differs on this subject from the civil law, the *donatio propter nuptias* must be understood as the provisions or settlements made by the husband on his wife, in consideration of the dowry he receives with her.

Donatio velata.—A veiled gift; a gift under pretence of being something else. "All deeds granted by the wife to third parties, in trust for the use of the husband"—"are truly *donationes velatæ*," and as such may be revoked. Ersk., B. 1, T. 6, § 35.

Dos.—Dowry, tocher.

Dubii juris.—Of doubtful law; an unsettled point.

Dummodo constet de persona.—Provided it be clear who is the person meant. A legacy is valid, although there may be an error in the name or designation of the legatee, if, from the whole deed or circumstances connected with it, it is sufficiently plain who is the person meant. See the cases of *Keiller*, 15 Dec. 1824, 3 S. 396; and *Keiller*, 16 June 1826, 4 S. 724. See *Constat de persona.*

Dummodo vassalli conditio non sit deterior.—Provided the vassal's condition be not made worse, or deteriorated. The superior's right of disposing of his superiority is restricted by this rule. He is thereby prevented from interjecting a mid superior between himself and the vassal, and also from conveying the superiority in divided portions, so as to subject the vassal in performance of the services to more than one

superior. This rule being designed to guard the vassal's interest, an objection founded upon it is competent to him alone, and may be barred by his acquiescence.

Duo non possunt esse domini ejusdem rei in solidum.—Two persons cannot have the full property of the same thing at the same time. There may, nevertheless, be many joint rights in the same subject at the same time, such as superiority and property, right of property and right of servitude, commonty, *pro indiviso* rights, &c.

Duorum pluriumve in idem placitum consensus et conventio pactum est.—A contract is the consent and covenant of two or more persons, agreed concerning the same thing.

Durante furore.—While the fatuosity or insanity endures. Insane or furious persons cannot be tried in a criminal court while they continue in that state, even for crimes committed before they were deprived of reason, because no criminal trial can proceed, unless the accused is capable of making his defence. Insanity is therefore a good plea in bar of trial.

Durior sors.—"That debt which bound the debtor fastest, or to which a penalty was adjected." (Ersk., B. 3, T. 4, § 2). Under the civil law, an indefinite payment made by the debtor was applied *in duriorem sortem.* By our law, indefinite payments are, on the contrary, allowed to be applied by the creditor to his least secured debt.

E

E contra.—On the contrary; on the other hand; conversely.

E converso.—Conversely. Another form of the preceding phrase.

Eadem persona cum defuncto.—The same person with the deceased. An heir succeeding by an universal title to his ancestor, and thereby becoming possessed of all his property, with the rights and privileges attaching thereto, is held liable in payment of his ancestor's debts, and fulfilment of his obligations. As the heir thus represents his ancestor in his rights and obligations, he is regarded in law as the same person as the deceased. The different modes in which an heir succeeds and makes up his title carry with them a varied extent of obligation. Thus, one who enters upon the succession *cum beneficio inventarii*, is only liable for the deceased's debts in so far as he is himself *lucratus;* while another, incurring a general passive title, is liable for the whole debts, whether he be *lucratus* to that extent or not. There are some claims, however, which, although tenable and well grounded against the ancestor, do not transmit against the heir,—such as a claim for damages on account of assault or slander, which partake of the character of delicts; but if these claims have been made the subject of an action before the ancestor's death, the action will transmit. Penal actions do not transmit against the heir. See *Actio contra defunctum, &c.*

Edicta.—Edicts, or the imperial rules issued under the civil law by the Emperor, to provide for the decision of questions which might arise. See *Decreta.*

Edictum perpetuum.—Perpetual edict. The law by which Roman citizens were governed, and their rights and obligations fixed, was originally that of the Twelve Tables. These constituted the first written code of laws among the Romans, and formed the basis of their law until the time of Justinian. They applied exclusively to Roman citizens, and could only be made available by those possessed of the privilege of citizenship, in enforcing their rights before the Praetor. As the Romans advanced in conquest, and in civilization, the principles of these Tables were found to be too narrow and rigorous, because, as many had come to reside within the Roman territory, for the purposes of commerce or protection, questions arose, not as formerly, between citizen and citizen, but between citizen and stranger. A new magistrate was appointed to deal with such cases, called the *Praetor peregrinus,* who, instead of confining himself to the strict municipal law of Rome, adopted the broader basis afforded by the principle of the law of nations. The wisdom of such a course soon commended itself to the Romans. What had been done for strangers it soon became necessary to do for themselves; and while the Twelve Tables were retained in all their integrity, it became the custom for Praetors, on their assuming office, to publish an edict setting forth the principles on which they would administer justice, in those cases for which provision was not fully made in the Twelve Tables. The authority of each edict expired with the office of its author; but it was generally termed *edictum perpetuum,* signifying that it should continue unaltered during the whole of its author's praetorship. In the time of Hadrian, however, the name acquired a different signification, for that Emperor directed Salvius Julianus, an eminent jurist, to draw up an edict, partly from existing edicts, and partly according to his own opinion of what was necessary, which should serve as the guide of all subsequent Praetors. This edict was termed *perpetuum,* signifying that it was perpetual and unchangeable, and it became a permanent part of the civil law.

Ei abest.—Literally, what is wanting to him. This refers to the proper disbursements made by one person on account of another, and for recovery of which he may raise action, generally the *actio contraria.* Thus a depositary is entitled to recover from the depositor any disbursements he may have

made, for the preservation of the deposit. So also is a *negotiorum gestor* entitled, not only to payment of that which he has paid on behalf of the person for whom he interfered, but also to relief from all obligations incurred on his account. Such payments are *ei abest*, because the payer is *minus* their amount.

Ejusdem generis.—Of the same class, or kind.

Ejusdem negotii.—Part of the same transaction.

Electio est creditoris.—The creditor has the election or choice. This has reference to a creditor's right to apply indefinite payments, made by his debtor, to that debt or obligation which is least secured. See *Durior sors.*

Electio est debtoris.—The debtor has the election or choice. Where there is an alternative in the mode of fulfilling an obligation, the debtor or obligant can adopt which he pleases. Thus, if there be an obligation to do a certain thing, or pay a certain sum, at a determined time, the obligant may fulfil his obligation, either by performance of the act, or by payment of the money.

Emphyteusis.—A right of property well known in the civil law, and analogous to the feu-holding of Scotland. It was said to be a lease in perpetuity, under which the tenant (called the *emphyteuta*) had all the rights of property, except the bare ownership, in return for which he became bound to the *dominus* or proprietor in the payment of a yearly sum, called *canon* or *pensio*. The emphyteuta's right descended to his heirs. For a full explanation of the right of *emphyteusis*, and of the analogy between it and our feu-right, see Ersk., B. 2, T. 4, § 6.

Emptio venditio.—Purchase, sale. The name given by the Romans to the contract of sale, being the two elements of which the contract was composed. The purchaser's rights were said to be *ex empto*, and the seller's *ex vendito*.

Enumeratio unius est exclusio alterius.—The special mention of one thing excludes anything different from it. This is a rule to be followed in the construction of statutes, where a general rule will be controlled and restricted in its application by a special enumeration of the cases to which it is intended to apply. Thus the Act 4 Geo. IV., cap. 37, relative to the desertion of servants, applies to "any servant

in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, *or other person.*" The ordinary interpretation of the last words of this clause would include every servant, but the legal interpretation limits it, in respect of the preceding enumeration, to "other persons," *of the same description* as those specified. Accordingly, it has been held that that Act does not apply to domestic servants. Normant *v.* Wilson, 25 Jan. 1845. 2 Broun (Jus. Rep.), 375. The phrase may be illustrated by a reference to a more recent statute. Before the passing of the Infeftment Act (8 and 9 Vict., cap. 35), it was necessary to give infeftment separately in each plot of ground, where they lay discontiguous, or being contiguous, were held under different titles, or of different superiors, or by different tenures, &c., even where the whole lands, so situated or held, were conveyed by the one deed. That statute was intended, doubtless, to abolish the necessity for such separate infeftments. It provided that the one instrument should be sufficient, "whether the lands lie contiguous or discontiguous, or are held by the same, or by different titles, or of one or more superiors." It made no provision, however, for the case of lands held by different tenures; and although the question was never tried, it can scarcely be doubted, (and this was the view adopted in practice), that on the principle of the rule now under illustration, separate instruments would, in such case, have been necessary, the special enumeration of the cases to which the Act was intended to apply excluding its application to cases not mentioned. The "Title to Lands Act" (1858) has put any question to rest which might have arisen on this subject, by abolishing the instrument of sasine altogether.

Eo ipso.—By the thing itself. Thus a deed by a minor, disposing of his heritage, or diverting the cause of his succession, is *eo ipso* null, and requires no reduction.

Eo nomine.—In that name, or in that character. A trustee, suing for a debt due to the trust, must sue *eo nomine*, as under any other character the debtor owes him nothing, and cannot be compelled to fulfil his obligation.

Errore lapsus.—A mistake through error. Such mistake will not invalidate a deed or contract, unless where it has been induced by the deceit or dole of the other party to it, or be an error *in substantialibus*.

Essentialia feudi—The essential qualities of the fee, which are inherent in the *dominium directum*, and remain in the superior without special reservation. Such, for example, are the superior's right to sell the superiority, and also his right to challenge encroachments and operations of third parties injurious to the feu, whether the vassal interferes or not. *Breadalbane*, 12 Feb. 1851, 13 D. 647.

Et sequentes paginæ—And following pages. Generally written *et seq.*

Etiam causa non cognita—Even where the cause has not been inquired into; without investigation. Many judicial acts are only performed in an enquiry into the facts on which they are to proceed (see *Causa cognita*); but there are other legal acts requiring no such investigation, such as an inhibition by a husband against his wife, to avoid liability for debts contracted by her.

Etiam in articulo mortis—Even at the point of death. A man may, at such a time, dispose of the dead's part of his moveables; he may then also recall a donation bestowed upon his wife; but no disposition of heritage prejudicial to the rights of the heir-at-law, granted at such a time, is effectual. See *Ex capite lecti.*

Ex adverso—Opposite to; over against.

Ex auditu—By hearsay, or report. Evidence founded upon hearsay is not, in the general case, admissible. There are some cases where it is admitted,—such as evidence of what a person, now dead, had said in lifetime. Witnesses are also admitted to speak to what they have heard, when it is a matter of general rumour; but in this case their evidence merely amounts to proof of the existence of the rumour, not to its truth in point of fact.

Ex bonis maternis—Out of the goods succeeded to through the mother.

Ex bonis paternis—Out of the goods succeeded to through the father.

Ex bono et equo—According to what is right and just; according to equity.

Ex capite doli—On the ground of dole or fraud. Where fraud has given rise to a contract, or the granting of a deed,

either can be reduced on that ground; and this phrase is the technical mode of setting forth such a reason for reduction.

Ex capite fraudis—On the ground of fraud. Another form of the preceding phrase.

Ex capite inhibitionis—On the ground of inhibition. Inhibition is a kind of diligence competent to creditors under our law (which they may use either on an extracted decree or the dependence of an action), whereby they are secured against the alienation of their debtor's heritable estate. This diligence prohibits the debtor from alienating, and interdicts third parties from taking conveyances to such estate, to the prejudice of the inhibiting creditor. If, notwithstanding such diligence being used, the debtor grants a conveyance, while the inhibition stands unrecalled or undischarged, the creditor can have such conveyance reduced *ex capite inhibitionis*.

Ex capite interdictionis.—On the ground of interdiction. Interdiction, now scarcely known in practice, was a means formerly adopted for the protection of those who were weak, facile, and easily imposed upon; and also for the protection of those who, being reckless and profuse, were unable to manage their estate with care and prudence. Interdiction was either judicial or voluntary; and in whichever of these modes the interdiction was effected and imposed, any disposition of heritage thereafter by the interdicted, without the consent of his interdictors, was liable to reduction on the ground of interdiction, except where the conveyances were onerous and rational.

Ex capite lecti.—On the ground of death-bed. All deeds disposing of heritage to the prejudice of the heir-at-law, executed within sixty days of his death, and while the granter is labouring under the disease of which he dies, are reducible on the ground of death-bed. But if the granter survive for sixty days after the granting of the deed, or attend at kirk or market, the plea of death-bed is elided. If the deed be onerous, it may still be reduced, but in that case the heir must reimburse the consideration paid. This plea is only competent to the heir, and only competent to him where he has an interest; so that if the reduction of the deed granted on death-bed has the effect of reviving a former deed which excludes the heir, he has no interest, and therefore cannot pursue the

reduction. The donatory of the Crown can reduce any deed prejudicial to his interest on this ground, because he represents the Sovereign, who is *ultimus hæres*. It must be remembered, that any deed, to fall under the provisions of the law of death-bed, must have been strictly voluntary, and such as the deceased could not have been compelled to grant; for a deed executed in performance of an obligation undertaken in *liege poustie* is not struck at by the plea of death-bed.

Ex capite minorennitatis et læsionis.—On the ground of minority and lesion. A minor, on this ground, can be restored against all deeds granted by him in minority, and that whether they have been granted with consent of his curators or not. Those deeds which are null, such as a deed granted by a minor having curators, but without their consent, can be challenged at any time; but those granted with consent of curators, or by a minor who has none, must be challenged within four years after attaining majority; and in such cases lesion (or injury) must be proved.

Ex causa lucrativa.—From a lucrative source; gratuitously. An heir who receives from his ancestor a gift, during lifetime, of that to which he would succeed after his ancestor's death, does not thereby avoid the liability of representation. He possesses it under a lucrative title, and is liable for his ancestor's debts contracted prior to the gift. If the transaction between the ancestor and the heir be an onerous one, no liability for debts attaches, because there is no *preceptio hereditatis*, but an onerous purchase.

Ex certa scientia.—From certain knowledge.

Ex comitate.—From courtesy. "*Comitas*, as used in international law, signifies the courtesy of nations, by which effect is given in one country to the laws and institutions of another, in questions arising between the natives of both." Bell's Dict. *v. Comitas.* See *Comitas legum.*

Ex continenti.—At once, without interval of time. If any one be violently dispossessed of that which is his, he may recover it by violence if done at the time; but if an interval of time elapses, possession can only be legally recovered by an application to the proper judge.

Ex contractu.—Arising from a contract; and may either refer to a right or an obligation so arising.

Ex culpa levissima—On account of the least fault. See *Culpa.*

Ex debito naturali—Arising from natural obligation. Natural obligations are those which arise only from the law of nature, or from equity; and they differ from civil obligations in this, that while the latter can, the former cannot be enforced at law.

Ex defectu juris—From a defect in the right. A seller is bound to warrant a purchaser against eviction. He does not grant warrandice against eviction by violence or accident, but only against eviction on account of a defect in his own right to the subject sold.

Ex defectu natalium—From defect of parentage. Formerly, by our law, bastards who died without lawful issue were incapable of making a testament, and this was said by some to proceed from their defect of parentage; on which Erskine remarks (B. 3, T. 10, § 6): "It is hard to discover a reason why a disability to test should be one of the consequences of illegitimacy." The disability was removed by the Act 6 Will. IV., cap. 22.

Ex delectu familiæ—From choice of a certain family. Titles of honour, &c., conferred by the patent of the Sovereign, are said to proceed from such choice on his part. They are not transferable; but a grant of lands along with the title gives the recipient the full right of property in them, and they may be disponed, or may be attached by the diligence of creditors.

Ex delicto—On the ground of, or arising from, delict. Delicts give rise to civil claims, as well as subjecting the person guilty of the delict to the punishment attached thereto. Thus, assault gives rise to a civil claim of damages, and murder to a claim of assythment.

Ex dolo—Arising from dole or fraud. See *Ex capite doli.*

Ex dolo non oritur actio—Fraud gives rise to no action. A contract founded upon fraud cannot be successfully enforced by the person guilty of the fraud. Any action raised by him to enforce it may be met with the exception stated in the phrase, that fraud gives rise to no action, and that the contract founded upon was a fraud. The person to the contract who was defrauded or overreached may, however, raise action *ex capite doli* to have the contract reduced. With him rests the

option of taking active measures for reduction of the contract, or of meeting any action brought against him upon it, with this exception.

Ex eo quod plerumque fit—From that which frequently happens.

Ex equitate—In equity: according to equitable rule.

Ex eventu—After the event, or occurrence.

Ex facie—On the face of it; evidently. This is said of what appears from the face of a writing. For example, a deed may be invalid or null on many grounds, such as fraud, that the person granting it was not in sound mind, &c.; but these do not appear from a mere perusal of the deed; whereas a deed which does not contain the names and designations of the witnesses, or of the writer of it, is *ex facie* null, these being essentials to the validity of the deed, and their want shewing its invalidity, without any enquiry whatever.

Ex facto enim jus oritur—Out of fact the right arises. Many a right, properly so called, arises out of matter of fact; such as a right acquired by prescriptive possession, or a servitude, arising out of prescriptive use. So also do the respective rights of upper and lower heritors on a stream arise, from the fact of their relative position.

Ex figura verborum—By the form of words used. A deed granted *mortis causa*, although in the form of a conveyance *de presenti*, if ineffectual in its real character, will not be improved by the character which it assumes from the form of words used. See Bell's Prin., § 1563.

Ex fraude creditorum—On the ground of fraud towards creditors. Preferences granted within sixty days of bankruptcy are reduced on this ground.

Ex incontinenti—Summarily, without delay.

Ex ingenio—According to the judgment of any one. Ersk., B. 1, T. 1, § 49.

Ex instrumentis de novo repertis—On account of documents subsequently found. Stair says that it is "much controverted whether solemn and formal decreets can be altered" on this ground. There can be no doubt that a decree would now be reduced, however solemnly pronounced, if it could be shewn, by documents subsequently discovered, that the party obtaining the decree had no right to it; as, for instance, if a

discharge was found of the debt or obligation for which the decree had been granted.

Ex intervallo—At some interval; at some distance of time.

Ex jure naturæ—According to the law of nature. Many of the duties incumbent on man to man are dependent upon this natural law, some of which, beside being natural, are also civil obligations. Thus, the civil obligation of a parent to maintain his children proceeds originally from the law of nature, and becomes a civil obligation, from its being imported into the common law. Those obligations which arise from the law of nature alone, cannot be enforced by the common law, such as the education of children.

Ex justa causa—For a just cause, or sufficient reason.

Ex justitia—Justly; according to justice.

Ex lege—Legally; according to law. Thus, interest on a bill, or money lent, is due to the creditor, from the day when payment should be made, *ex lege;* that is, according to the provision of the common law thereanent, although there may have been no paction on the subject between the creditor and his debtor.

Ex locato—Arising from the contract of location. For the two actions to which this contract gives rise, and their nature, see *Actio.*

Ex maleficio—From delict.

Ex mandato—According to the mandate; arising from the contract of mandate. Anything done by a mandatory in terms of the powers conferred upon him by the mandate, is said to be done *ex mandato.* This phrase may also refer to the rights and obligations arising respectively to the mandant and mandatory under their contract. The contract of mandate gives rise to the actions *directa* and *contraria.*

Ex mora debitoris—On account of the debtor's delay. *Mora* signifies not only delay, but undue or culpable delay, which subjects any person guilty of it in its consequences. Thus a debtor's delay in making payment of his debt renders him liable for interest; and undue delay on the part of one of the parties to a contract, will subject him in the consequences, or entitle the other party to resile.

Ex natura—Naturally; according to nature.

Ex natura feudi—According to the nature of the heritable right.

Ex natura rei.—According to the nature of the thing, or of the transaction.

Ex nobili officio.—On account of, or by virtue of the *nobile officium*, which is the name given to the equitable power vested in the Court of Session, whereby it may, to a certain extent, abate or modify the rigour of the law, and afford an equitable remedy in cases where strict law would afford none.

Ex officio.—Officially; by virtue of the office.

Ex paritate rationis.—From a parity of reason.

Ex pietate.—From natural affection and duty.

Ex post facto.—Done afterwards. Any act performed to affect some right or demand brought into question before the performance of that act, is called *ex post facto*. A law is called *ex post facto* which has a retrospective effect.

Ex proprio motu.—Of his own accord. Without any motion on the subject being made by any of the litigants, the judge may in the course of a process order certain things to be done. He may order a more articulate statement, a more express answer, the addition of certain pleas, or may order the deletion of a part of the record, which in his opinion is irrelevant. Such orders are said to be pronounced *Ex proprio motu*.

Ex qua persona quis lucrum capit, ejus factum prestare debet.—He who derives advantage from any one, should bear that person's obligations, or make good his deeds. Thus a husband who by the marriage succeeds to the whole moveable estate of his wife, is bound in payment of her debts and fulfilment of her obligations; as also is an heir liable for the debts and deeds of the ancestor to whom he succeeds, and whom he represents.

Ex quasi contractu.—Arising as if from a contract, or (as it is technically termed) arising from *quasi* contract. Obligations and rights arise from *quasi* contracts as well as from those that are express. A *quasi* contract is one constituted not by express consent, but by the circumstances out of which it arises. Thus an heir is bound by *quasi* contract for his ancestor's debts; and where goods are thrown overboard for the purpose of saving the ship and remainder of the cargo, the owners of the ship and of the cargo saved are liable, *quasi ex contractu*, for the value of the goods that have so perished. In

such cases there could be no express contract, but the rights and relative obligations emerged from the circumstances.

Ex quasi delicto—From *quasi* delict. A *quasi* delict is that which nearly amounts to crime, but without doing so or inferring criminal prosecution, yet involves such *culpa* as to give rise to civil action for reparation, &c.

Ex quasi maleficio—Another form of the preceding phrase.

Ex re—Arising out of the thing, the transaction, or the circumstances. *Quasi* contracts arise *ex re*.

Ex reverentia maritali—Out of reverence or respect for the husband.

Ex sua natura—In its own nature or character.

Ex vi aut metu—On the ground of force or fear. Any deed granted under coercion may be reduced on this ground, because consent under such circumstances is not free, and cannot therefore be binding. The degree of force or fear used may be varied, and its degree will be inquired into as material in deciding whether the deed is valid or not. The fear induced must be *justus metus*, a just or sufficient fear, such as would overpower a mind of ordinary firmness; or such as, applied to the mind of a person of weaker age or sex, would have that effect. Thus a threat of death, or infamy, will be regarded as sufficient to render the deed invalid, but the mere threat of annoyance, or a lawsuit, will not. Force may also be varied in degree, and it will always be a question of circumstances whether it was a force which could not have been resisted. *Vis major*, in regard to this subject, represents actual personal violence.

Exceptio firmat regulam in casibus non exceptis—An exception confirms the general rule in those cases not excepted. The exception expressed infers that there are no other exceptions. See *Enumeratio unius*, &c.

Exceptio litiscontestatæ—The exception or defence of litis contestation. This exception (which was not known as a defence in the Roman law, although the name is borrowed from it), seems, as explained by Stair (B. 4, T. 40, § 18), to be that known in our time as the exception *lis alibi pendens*.

Exceptio non numeratæ pecuniæ—The exception or defence that the money was not paid. This was one of the exceptions of the Roman law, and could be pled by any one who had

undertaken a certain obligation in the expectation of receiving a certain sum of money in return which was never paid him. The exception was only available for two years from the date of the obligation. In Scotland, if a person granted a bond for a certain sum of money and in it acknowledged its receipt and became bound for its repayment, he would be entitled to resist any action or diligence raised upon the bond by the grantee, upon the exception that he had never received the money. Such an exception would be available at any time against the grantee or his representatives, but would not be competent against an onerous assignee. The acknowledgment in the bond that the money had been received, is not so absolute as to prevent its being redargued by proof.

Exceptio rei judicatæ.—The exception that the question now raised has already been decided. If the question at issue between the litigants has already been decided by any competent judge, a new action to try the same question would be thrown out of court upon this exception. Even if the question was first decided in an inferior Court, a new action would not be competent before the Supreme Court; the competent course being to bring the decision of the inferior Court under review.

Excludendo fiscum et relictam.—To the exclusion of the rights of the crown, and of the widow. Stair, B. 3, T. 4, § 24.

Exempli gratia.—For example. Usually written *ex. gr.*, or *e.g.*

Exercitor.—The person "to whom the daily profits of a ship belong." (Just. Inst., B. 4, T. 7, § 2). This name (although it includes a freighter or hirer) is generally given to the master of a ship, who has power by his acts to render the owners of it bound for the obligations undertaken by him in connection therewith. See *Actio institoria.*

Expressio falsi.—A false statement. The fraud or misrepresentation on the ground of which a contract can be reduced, may be either positive or negative. It is either the making of a false statement, knowing it to be untrue, or the concealment of a material fact which should have been disclosed. The latter is called the *suppressio veri.*

Expressio unius est exclusio alterius.—The special mention of one thing operates as the exclusion of things differing from it. See *Enumeratio, &c.*

Expromissor.—The name given in the civil law to a person who undertook the debt of another, by which the original debtor was freed from his obligation in so far as regarded the original creditor. See *Delegatio.*

Extra commercium.—Beyond commerce. This is said of things which cannot be bought or sold, such as public roads, rivers, titles of honour, &c.

Extra curtem domini.—Beyond the domain or jurisdiction of his superior. When a vassal's service was a money payment, or delivery of a quantity of grain for the superior's use, he was not bound, except on special conditions, to carry or deliver it beyond the superior's domain.

Extra familiam.—Outwith the family. A child is said to be outwith its father's family when it is forisfamiliated. It is *intra familiam* before this takes place.

Extra ordinem.—Out of the usual rule. Judgments *extra ordinem* under the civil law were those pronounced at the discretion of the judge.

Extra præsentiam mariti.—Outwith the presence of the husband. The ratification of all deeds executed by spouses, is made by the wife outwith the presence of her husband, the object being to give her an opportunity of declaring (if such be the case) that she acts under the coercion of her husband, and not voluntarily. It was held at one time that the execution of such a ratification barred the wife at any time thereafter from reducing the deed on the ground of force or fear. Whether it would have such an effect now, is a matter of controversy and doubt, but the preponderance of authority would seem to indicate that it would not. In support of the former view, see Brodie's Stair, Note by Editor, B. 1, T. 4, § 18; Bell's Com., vol. i. p. 143; *Grant,* 8th July 1642; while in support of the latter, see Ersk. B. 1, T. 6, § 34; Menzies' Lectures, p. 40; *M'Neill,* 8th December 1829.

Extra territorium judicis.—Beyond the territory of the judge; *i.e.,* beyond the territory over which he has jurisdiction.

Extremis probatis media presumuntur.—Extremes being proved, those things which fall within or between them are presumed. Thus, in a reduction of a deed on the ground of deathbed, where it is necessary to show that the deceased at

the time he executed it was labouring under the disease of which he died, it will be sufficient to prove that the deceased was attacked by that disease and that within sixty days of executing the deed the granter of it died; the fact of the disease, and the subsequent death being proved, the Court will presume the continuance of the disease between these two periods.

F

Faciendo domino superiori quod de jure facere tenetur.—By performing that to the superior which by law he is bound to perform. This refers to the duties of the vassal. He is bound, on claiming an entry, to perform the service or pay the non-entry duties, relief, &c., which under his title the superior has a right to demand on such an occasion; and a charge by the heir upon the superior, charging the latter to enter him as vassal, may be suspended on the ground of the failure in such performance or payment.

Faciendo vobis quod de jure facere debet.—On his performing that to you which he is bound by law to perform. These are the terms of the old precept of Chancery granted to an heir on which he charged the superior for an entry, ordaining the superior to give the entry on all his legal rights being satisfied.

Facio ut des, facio ut facias.—I do that you may give, I do that you may do. For an explanation of these phrases, see *Do ut des.*

Factio testamenti.—The power of making a testament, or of acquiring under a testament made by another. Under the civil law, this was a power at one time vested only in the Roman citizen, although it became more general in the time of Justinian. The *testamenti factio* was necessary to any participation whatever in a testament. No one could test without it, nor could a legatee benefit by the legacy bequeathed to him unless he had this power. Every testamentary tutor appointed by the testator required to have the *testamenti factio,* or their appointment was void. In Scotland, prior to the passing of

the Act 6 Will. IV. c. 22, a bastard dying without lawful issue, had no *testamenti factio*, and his property passed to the Crown; but, by that Statute, such persons were empowered to dispose of their moveables by testament in the same manner as others. In Scotch law, this phrase can only signify the power of making a will, as any one may be a beneficiary under another's settlement.

Factum impræstabile—An act that cannot be performed: an impossibility.

Factum proprium—One's own act.

Falsa demonstratio non nocet—An erroneous description does not injure. The application of this maxim is not universal. If the description be essential, as, for example, the description by name and designation of the writer of a deed or of the testamentary witnesses, any error therein will be fatal to the deed, although there be no room for doubt as to the individual. But where the description is merely expository, an error in it will not vitiate, if it be clear who is the person intended to be specified. See *Dummodo constet*, &c., and cases there cited.

Familia.—Family. The word *familia* as used in the civil law, had a much more comprehensive signification than that which it has in our law. In the latter it is used as signifying merely the members of one household, *i.e.*, the husband, with his wife and children, and very often signifies the children alone; while in the former it signified all who were in any way under the power (*in potestate*) of the *paterfamilias*, including wife, children and their wives and children, slaves, &c. *Familia* was also used as a name for the whole property of the *paterfamilias*, and hence the name of the action for division of that property, *familiæ erciscundæ*.

Fatetur facinus qui judicium fugit.—He confesses the crime who flees from trial. The maxim is too broadly stated; for although it be alleged in an indictment, in the usual language "that you, the said A. B., being conscious of guilt in the premises, did abscond and flee from justice," the proof of such flight will not be regarded in itself as an admission of guilt. Any one might be so overwhelmed with a sense of danger, arising from the mere charge of a crime, as to induce him to flee, while perfectly innocent. The flight, with attendant cir-

cumstances, such as disguising the person, &c., would doubtless be elements for the consideration of a jury, but in themselves would never warrant a conviction.

Feuda.—The name given to feudal grants of land, when these grants were made absolute. Previously they were termed *munera*, and were then only grants for life, but as *feuda* they were made descendible to heirs, and transmissible to collaterals. See *Beneficia*.

Feuda ad instar patrimoniorum sunt redacta.—Lands held feu are reduced to the character of a patrimony or succession. The meaning of the phrase is, that lands held feu have now lost their strictly feudal character, and are become like any other succession which may devolve upon the heir. Under the old feudal system, where lands were held in return for military services, a woman could not have succeeded, but having lost that character, she may now succeed to heritage equally as to moveables.

Feuda pecuniæ.—A kind of fee, or heritable right in money, sometimes called *feuda nominis*. Erskine explains, that although "there is no proper *feudum* of money, or of bonds, yet, as a yearly profit arises from money as well as land, lawyers have admitted a *quasi feudum* in bonds, which gets the name of *feudum nominis*." (B. 3, T. 8, § 34). The personal bonds here referred to were held heritable after the term of payment was past; but they were made moveable by the Act 1661, c. 32, except as regards the fisk, and the rights of husband and wife. See the case of *Gray*, 11 Mar. 1859. 21 D. 709.

Feuda soldatæ.—This is described in the *Consuetudines Feudorum* (B. 2, T. 10) as "a certain yearly gratuitous payment, which transmits on neither part to the heir; for it is put an end to by the death of either the giver or receiver. It is called *soldata*, because, for the most part, it consists in a donation of *solidi;* although sometimes consisting in a gift of wine, corn, or other produce of the land."

Feudum antiquum.—The name given to lands acquired by succession, in contradistinction to that (*novum*) acquired by conquest. See *Antiqua et nova*.

Feudum burgale.—Lands held by burgage tenure. "Burgage-holding was introduced for the benefit and protection of the trading and mechanical portion of the community, who

were driven to take refuge in towns from the dangers of the open country, during the barbarous period of feudal warfare." (Duff. Feud. Con. 49). The return for lands so held was watching and warding within burgh, or as it is generally expressed in charters, "for service of burgh, used and wont."

Feudum ex camera aut cavena.—"In feudal law, was an annual sum of money, or supply of corn, wine, and oil, paid out of the lord's possessions to a soldier, or other well-deserving person. It resembled a pension." Bell's Dict., *h. v.*

Feudum francum.—One of the kinds of feudal tenures, called free fee. It was so called because the vassal was free of all feudal services, and was only bound to the superior by an oath of fealty. "It arose when the feudal manners began to give place to a certain degree of industry and civilisation, and superiors who were in want of money were willing to give lands to their vassals at nominal or quit rents, in consideration of a large sum advanced in a single payment." (Duff's Feud. Con. 49). This holding, in modern phrase, is termed blench-holding.

Feudum militare.—A feu held in return for military services. Wardholding, the military tenure of this country, was abolished by the Act 20 Geo. II., cap. 50.

Feudum nominis.—See *Feuda pecuniæ.*

Feudum novum.—Land acquired by conquest, *i.e.*, by any singular title, such as purchase, gift, &c. See *Antiqua et nova.*

Feudum rectum.—The name given by the feudalists to lands held by military tenure, called *Feudum militare* in the *Regiam Majestatem.* The vassal holding by this tenure, and liable in the military services it imposed, was called *miles.*

Feudum simplex.—A fee simple, or one under which the lands descended to heirs whomsoever, in contradistinction to an entailed fee, under which heirs-male alone succeeded.

Feudum talliatum.—A tailzie, or entailed fee, under which heirs-male alone succeeded. This was also called a male fee, and was called *talliatum,* because under tailzies females were generally excluded.

Fiat ut petitur.—Let it be done as prayed for. These are the words used in certain cases when granting the warrant sought for. Thus, under the Personal Diligence Act, after a

charge of payment has expired, and the creditor seeks a warrant for the imprisonment of his debtor, such warrant, when granted, is expressed in these terms, *Fiat ut petitur.*

Ficta traditio.—Fictitious delivery. Delivery was at one time essentially necessary, to pass the property of the thing sold from the seller to the buyer. In cases where the buyer was already in possession of the subject, either as lessee, depositary, or in any other character, and actual delivery did not thus take place under the sale, the law presumed a delivery under that contract, although the possession remained undisturbed, and such delivery was called *ficta traditio.*

Fictio brevis manus.—Another name for the presumed delivery above mentioned.

Fictio juris.—A fiction of law. This is a legal presumption, grounded on equity, that a certain thing is true, which may be false, and which, it may be, is as likely to be false as true. Thus, a child legitimated by the subsequent marriage of its parents, is legitimated because, by a fiction of law, that marriage is supposed to have been contracted at the time when the child was begotten. If the parents at that time could not have been lawfully married, a subsequent marriage would not legitimate the offspring. By a fiction of law also, the heir is supposed to be the same person as the deceased, and liable in all his obligations. All such fictions or presumptions may be redargued by proof.

Fideicommissa.—Trusts. By the civil law, no one could take any benefit under a will or testament unless he had *testamenti factio* with the testator. But as it often happened that a testator desired to benefit some one under his will, who had not this *testamenti factio*, the plan was adopted of appointing some one who had as the heir, enjoining him at the same time to transfer to the person really to be benefited the legacy or property, whatever it might be, which the testator wished to leave to him. Such injunctions the heir was not bound by the civil law to regard; and as they were entrusted thus to his honour and good faith, they were called *fidei-commissa.* At a later period the heir could be compelled to fulfil the purposes of any trust reposed in him. Nothing is more common in the practice of our law, than for testators to dispose of their

estate by trust-deed, and the trustee, once accepting, is bound to carry out all its purposes.

Fideicommissarium feudum.—A fee in trust; a fiduciary fee. Craig gives this name to the right in the person of a superior, into whose hands lands have been resigned *in favorem.*

Fidejussor.—Cautioner. This kind of cautioner could be added to any contract, and his obligation transmitted against his heirs. It was different with the *adpromissor*, which see.

Fidelitatis sacramentum.—Oath of fealty, given by vassals to their over-lords.

Fidem facere judici.—Literally, to make faith to the judge. The equivalent for this phrase, in technical language, is, to bear faith in judgment, *i.e.*, to afford competent proof of the statements made, or claim advanced.

Filii-familias.—All the children in a *familia*, who were subject to the power of the *pater familias*, including those who were his own deseendants, and those who had become subject to him by marriage or adoption.

Finium regundorum (actio).—An action for defining and fixing the boundaries of lands lying contiguous. See *Actio.*

Fiscus.—The fisk. Among the Romans this was the name given to the private treasury of the Emperor, and was distinct from *ærarium*, the public one. By the writers on Scotch law, this word is used to denote the revenue of the crown; and also (as in the Act 1661, cap. 32) the crown's right to the moveable estate of persons denounced rebels.

Flagrante crimine.—In the act of committing the crime, or immediately after the commission. Ersk., B. 1, T. 4, § 4.

Flumen.—In our law this word is used in reference to the servitude of stillicide, and signifies the water falling from the roof when collected in a spout. When not so collected it is called stillicide or eaves-drop.

Fœdata.—Polluted; violated.

Fœnus nauticum.—Marine interest, or the rate of interest which a person gets in return for money advanced on a ship, or on bottomry. The rate depends upon the terms of the contract, and will vary according to circumstances,—such as the length of the voyage, the sum advanced, and the risk incurred.

It is always much higher than ordinary interest, because, if the ship perishes the lender has no claim for the sum advanced.

Forma verborum.—The form or tenor of the words.

Formula.—A form in law. The *formula* of the civil law, was that writ containing the directions from the Prætor to the *judex*, to be followed in deciding a certain disputed question. It consisted of three parts:—1. The *demonstratio*, which set forth the allegation of the plaintiff on which the suit was founded. 2. The *intentio*, containing the precise claim advanced; and 3. The *condemnatio*, directing the judge to find the defendant liable, or absolve him, according to the circumstances. The system of *formulæ* was abolished before the time of Justinian.

Forum competens.—A competent court, or one to the jurisdiction of which that person is amenable who is brought before it. Thus, in the ordinary case, the court in one county is not *forum competens* in the case of a person residing in a different county, but the Court of Session is *forum competens* in any question between persons residing in Scotland, and even in cases against foreigners, where jurisdiction has been founded by arrestment for that purpose.

Fovere consimilem causam.—To favour or maintain a similar case. A judge may be declined if he has a personal interest in a case, the decision of which may rule the decision of the one in which he is declined.

Fructus civiles.—Civil fruits; which are the rents and profits arising from subjects producing no proper or natural fruits, such as rents of lands or houses, interest on money, &c.

Fructus pendentes.—Fruits still hanging, or not separated from the subject which produces them.

Fructus rei alienæ.—Fruits produced by a subject belonging to another person.

Frustra petis quod mox restituturus es.—You seek in vain that which you must immediately restore. Compensation or set-off proceeds upon the principle of this maxim, as the defender, if he were decerned to pay the pursuer the sum sued for, could compel him to repay it under a new action.

Frustra probatur quod probatum non relevat.—It is useless to prove that which, when proved, is not relevant to the question at issue. Thus, to prove, under a criminal indict-

ment charging the prisoner with theft from the person of A., that the prisoner was guilty of stealing something, in exactly the same manner, and at the time specified, from the person of B., would be unavailing, as irrelevant to the charge laid. Formerly, in civil causes, no proof of facts was allowed until the relevancy was disposed of; but it is the frequent custom now to allow a proof of facts without disposing of the question of relevancy. Such proofs are said to be "before answer."

Functus officio.—The office or duty being performed. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus, a judge, when he has decided a question brought before him, is *functus officio*, and cannot review his own decision. So is an arbiter, when he has issued his decree-arbitral.

Fundo annexa.—Things annexed or attached to the soil. These may be either corporeal, such as houses, trees, &c., or incorporeal, as rights of patronage, right to teinds, &c. All things thus attached to the soil are considered heritable, and pass with the lands to the heir.

Furtum.—Theft. The Romans distinguished between *furtum manifestum, i.e.*, the case where the thief was caught in the act, or in the place where the theft was committed, or before he reached the spot to which he intended to convey the stolen property; and *nec manifestum*, where none of these circumstances had place. This distinction is similar to that once regarded in Scotland, as infang thief and outfang thief, a distinction long ago abolished.

G

Garba.—A sheaf or handful of corn. Ersk., B. 2, T. 10, § 13. See *Decimæ Garbales.*

Gestio pro herede.—Behaviour as heir. Such behaviour incurs a passive title, rendering the person so conducting himself universally liable for his ancestor's debts and obligations. It consists in intermeddling with the ancestor's estate, by granting leases, drawing rents, disponing part of the property, and, in short, by the commission of such acts as an heir alone should, or could, competently perform. Such acts, however, to incur such a passive title and its liabilities, must be performed *animo gerendi* (with the intention of acting as heir), for any act whereby the *gestor* did not take any advantage, or any act inadvertently performed, and not followed up by subsequent interference with the estate, will not incur the passive title.

Gleba.—The glebe, or piece of ground given in addition to their stipends to the ministers of the Established Church.

Gleba terræ.—Clod or piece of earth. Proprietors of land *pro indiviso*, such as heirs-portioners, have a right of property in every piece of the land over which the joint right extends.

Grammatica falsa non vitiat chartam.—Grammatical error does not vitiate a writing. See *Mala Grammatica*, &c.

Granum crescens.—Growing grain.

Grassum.—A sum paid in anticipation of rent, or a fine paid for a lease of lands during a term of years. Thus, in feu-contracts and leases, it is often stipulated that a double of the feu-duty or rent shall be paid every nineteenth year, over

and above the payment for that year. Such an additional payment is called a *grassum.*

Gratia mandatarii.—For the sake of the mandatory. In the general case, a mandate, being for the benefit of the mandant, may be recalled by him at pleasure. Mandates, however, which are granted solely for the sake (or advantage) of the mandatory, such as the mandate contained in the registration clause of a deed, whereby the granter gives authority for its registration, are not revocable. Such also is the character of the mandate contained in a precept of sasine, which is not revocable by the granter, and which may be acted upon after the death, not only of the granter, but also of the grantee.

H

Habili modo.—In the manner competent. Thus the habile mode of proving the existence of a debt which has undergone the triennial prescription is by writ or oath of the debtor; or, of a disputed trust, by the oath or writ of the trustee.

Habilis causa transferendi dominii.—A suitable reason or consideration for transferring the property. Although it is not necessary to the validity of a conveyance, that the consideration moving the disponer to the tranference should be a money payment, or other valuable consideration; yet it is often necessary to regard the cause of granting in considering the effect of the conveyance itself. Thus, where lands are conveyed by a vassal to his superior, by resignation *in favorem* of the vassal's disponee, such conveyance transfers the subjects to the superior only to the effect of enabling him to give them out again to the new vassal; the property not being transferred to him (to the effect of transferring the ownership) by the vassal's surrender of the lands. In such conveyance there is no cause or consideration on account of which the superior could retain the lands. On the contrary, the cause, as expressed, points to his conveying them to the new vassal, the disponee. Mere intention, or wish to transfer, is a sufficiently habile cause for a conveyance; but in the case supposed there is no such intention, and therefore the law holds that, in such circumstances, the fee of the property continues vested in the resigner during the period intervening between the resignation and the completion of the disponee's feudal title. Where there is no habile cause for conveying, there can be no conveyance.

Hæredes nati et facti.—Heirs born and made. The former is heir by virtue of his birth, and consequent relationship

to the deceased, and is called heir-at-law; while the latter is only heir by appointment, that is, an heir of provision. Heirs are divided into two great classes—namely, those who are heirs *provisione legis*, (by provision of the law), and those who succeed *provisione hominis* (by the provision or appointment of the testator); the former corresponding to the *nati*, the latter to the *facti* of the phrase. All included in the latter class are known as heirs of provision.

Hæredes necessarii.—Necessary heirs. A class of heirs under the civil law, who had no choice in taking up the succession or rejecting it, and were generally slaves appointed in this character to preserve the good name of their master after death. The sale of a deceased's effects for the payment of his debts, affected his *existimatio*, or reputation, and often inferred infamy, to avoid which an insolvent master appointed his slave his heir, so that when the effects were sold, they were regarded as the property of the heir, not of the testator—whose name was thus preserved unblemished. There are no such necessary heirs in the Scotch law.

Hæredes proximi et remotiores.—Heirs nearer, and more remote.

Hæredes sui.—This name was given to those persons who were under the power (*sub patria potestate*) of the deceased at the time of his death. Some controversy has taken place as to the meaning of the term *suus* applied to these heirs, the import of which will be found stated in Sandar's Justinian, 311.

Hæredibus et assignatis quibuscunque.—To heirs and assignees whomsoever. These are the terms of a simple destination, and will be held to mean the heir-at-law in any question regarding the interpretation of such a destination.

Hæreditas.—Succession; inheritance. This includes the whole estate of the deceased, whether heritable or moveable, but is frequently used as signifying merely heritage as opposed to executry.

Hæreditas jacens.—A succession which the heir has not entered upon or taken up, which still lying in the right of the deceased is liable to be attached by the diligence of creditors for the deceased's debts.

Hæreditas paterna.—A succession descending upon the

heir from or through his father, in contradistinction from that derived through his mother, or through collaterals.

Hæres.—Heir. An heir is one who succeeds to the estate of a deceased person, either by force of legal rule or private provision; and the name is given as well to one who succeeds to moveables as to one who succeeds to heritage, although the former is generally, and more correctly, termed executor. The term heir is generally qualified or explained by some other term joined to it. Thus heir-at-law expresses at length what is most frequently understood by the term heir, and is the name given to the person succeeding according to the legal rules regarding succession. Heir of provision is one who succeeds to a certain right provided to him under a certain deed; and heir by destination, or of entail, is one who is called to the succession only on the failure of another who is called to it before him.

Hæres actu.—Heir by appointment. Erskine uses this phrase in treating of the rights of a child under the marriage settlement of its parents. Where such settlement confers a certain *jus crediti* on the heir of the marriage, the child of the marriage is not deprived of its right, although its father should deprive it of the character of heir, by the nomination of some other person to his succession. "From these observations it follows, that though the rights which thus create a proper credit be granted to *the heir* of the marriage, that appellation is to be understood only *designative*, for marking out that the person to whom the right is granted stands in such a relation to the deceased as gives him a right to serve to him if he should think fit; but there is no necessity that he be *hæres actu* to his father (that is, heir to his father, through his father's act, deed, or appointment), for he is the proper creditor." Ersk., B. 3, T. 8, § 40.

Hæres fiduciarius, or **fidei-commissarius.**—An heir in trust; a trustee. This name is given to the person or persons appointed by the testator's settlement to succeed to his estate, in order that they may fulfil the purposes of the testator's will. They are termed heirs because they succeed to the estate of the deceased; and fiduciary heirs, because the succession devolves upon them in trust for the fulfilment of the provisions of the settlement.

Hæres hæredis mei est hæres meus.—My heir's heir, is my heir. A destination to heirs, on the principle of this rule, includes not only the immediate heirs of the granter, but the remoter heirs succeeding through them. Thus, a grandson is the heir of his grandfather, because he is the heir of his father, who was the immediate heir.

Hæres in mobilibus.—Heir in moveables. Executors are so called because they succeed to the moveable estate of the deceased.

Hinc inde.—"A technical expression used in Scotch legal phraseology, to signify on either side, or on this side and the other, as connected with a particular process, account, or transaction. Thus, the claims of parties *hinc inde*, signifies their reciprocal claims against each other, as at a particular time, or in a particular process or suit." Bell's Dict. *h. v.*

Hoc intuitu.—In this prospect or expectation. Deeds granted *intuitu matrimonii*, are of no avail if the marriage never takes place, and simply because they were executed in the expectation of an event, which, as a condition, had failed.

Hoc loco.—In this place.

Hoc nomine.—In this name; under this character. See *Eo nomine.*

Hoc ordine.—In this order.

Hoc titulo.—Under this title; frequently used by way of reference in law books, and often written *h. t.*

Hoc voce.—Under this word or phrase; used by way of reference, and generally written *h. v.*

Homicidium in rixa.—Manslaughter committed in a quarrel or brawl. Such crime amounts only to culpable homicide, and the punishment being in the discretion of the judge, varies according to the particular circumstances of each case. It is not punished capitally, because this crime lacks the previous malice essential to the crime of murder.

Honeste vivere.—To live honourably, or morally. This is one of the fundamental maxims of law, as given by Justinian. *Honeste* includes more than mere obedience to the rules of law; for *non omne quod licet honestum est* (every thing permitted by law is not morally right). It included all social and moral obligations, whether they could be enforced at law or not. See *Alterum non lædere.*

I

Id est.—That is; usually written *i.e.*

Id non agebatur.—Literally, that was not done. Stair uses this phrase in the following passage, which serves to illustrate it. In treating of the liability of executors for the full value of the subjects given up in their inventory, he states that they are entitled to value the subjects in certain cases at the value put upon them by the deceased, but "otherwise executors are comptable according to the ordinary prices; seeing *id non agebatur* by the price (that is, by the deceased's valuation) to gift to the executor." Stair, B. 3, T. 8, § 62. The meaning of the words as they occur here is this; the deceased when he valued the subjects did not intend to depreciate their value for the purpose of benefitting the executor,—this was not in his consideration at all—this was not what he did (*id non agebatur*) by the valuation; therefore, the executor is bound for the true value of the subjects.

Id quod prius fuit voluntatis, postea fit necessitatis.—That which was at first a matter of choice, becomes afterwards a matter of necessity. On this rule is founded the obligation of a tutor or curator, having once accepted the office, to hold it, and fulfil its duties. To accept the office depends upon the free will of the person accepting, but having accepted, to perform the duties of that office becomes a legal obligation. So also an arbiter having accepted office cannot resign, but must pronounce his decree-arbitral; and in like manner testamentary trustees cannot resign, unless the truster has given them power to do so under the deed of their appointment.

Id solum nostrum quod debitis deductis nostrum est.—That only is ours which remains to us after deduction of debts. An heir succeeding to the whole estate of his ancestor, succeeds to it less the burdens which affect it, because debts, &c., belonged to others, and were no part of the deceased's possession. The estate of a rebel or criminal falling as escheat to the crown, is also, according to Stair, subject to the deduction of just debts.

Id tantum possumus quod de jure possumus.—We can do that only which we can lawfully do. This has reference to contracts in themselves unlawful, or having unlawful conditions thereto attached. Such contracts and conditions cannot be enforced, for they are considered as legally impossible,—not capable of receiving legal effect.

Ignoramus.—We are ignorant. The word formerly indorsed on a bill laid before the grand jury (in England) when they ignored the bill. It is not now used. See *Billa vera.*

Ignorantia facti.—Ignorance of a fact; and used in opposition to

Ignorantia juris.—Ignorance of the law. Where any payment has been made or service performed, on an error in fact, restitution can be enforced; not so, where the error was one in law. On the latter point our law seems scarcely settled, although as a general rule error in law is not admitted as a ground on which restitution may been forced. See *Condictio indebiti.*

Ignorantia juris neminem excusat.—Ignorance of the law excuses no one. Every one is presumed to know the law, and therefore a plea of ignorance will not excuse a breach of it. Ignorance when not plainly culpable may induce leniency, as where a law newly promulgated, and the provisions of which are not yet generally known, has been broken.

Impedimentum rebus agendis.—A hindrance to the transaction of business. "It was not found relevant to elide deathbed, that the defunct was in strength and ability to have come to kirk and market; nor that the defunct put on his clothes daily, and that any disease he had was but lent (mild), and not *impedimentum rebus agendis.*" Stair B. 3, T. 4, § 28.

Imperitia enumeratur culpæ.—Unskilfulness is reckoned as a fault. In the hiring of skilled labour, the employer is

entitled to rely on ordinary skill, and damage arising from the want of it, may be recovered from the person employed. Mere error in judgment in a professional man, is not sufficient to found a claim for damages, if he should be shown to be wrong, unless in acting on his own judgment, he has departed from the common rule or practice observed in like cases.

Imperium merum.—The name given in the civil law to the power conferred on judges of executing sentences on criminals; sometimes called the *jus gladii*. Dig., L. 2, T. 1, l. 3.

Imperium mixtum.—The name given to the authority possessed by judges in civil matters; called *mixtum*, because it conferred power to declare the law (*juris dictio*), and also the power of enforcing their decisions. Dig. *ut supra*.

In acquirenda possessione.—In the course of acquiring possession.

In alode.—Allodial subjects; which were lands held independent of any superior, and burdened with no feudal homage or service.

In apicibus juris.—In the subtleties of the law. See the speech of Lord Meadowbank in the case of *Harvie*, 12 Dec. 1811. F. C.

In arbitrio alieno.—According to the judgment of another. Legacies are said to be so bequeathed, when their distribution and extent are left to the judgment and discretion of persons other than the testator. Thus, a testator may (and such a case is not unfrequent) bequeath large sums of money to be divided among certain charities, as his trustees may think proper. "It is at the best doubtful whether, by will, a general and unlimited power of distribution, after the testator's death, can be given to another; but if distinct limits are appointed for the exercise of the power, it will be effectual." Bell's Prin., § 1883.

In arbitrio judicis.—In the discretion or decision of the judge.

In æmulationem.—Emulously; with a desire to injure or annoy; or acting wantonly, so as to produce injury or annoyance.

In æmulationem vicini.—To the injury or annoyance of a neighbour. A proprietor must use his property so as not to injure the property of another. If the act done is necessary

to the improvement, or adds to the value of his subject, the right to perform it falls within his right of property, and may not be interfered with. But if the act be unnecessary, or not advantageous, and be performed wantonly, to the injury or annoyance of his neighbour, he may be compelled to desist. Ersk., B. 2, T. 1, § 2.

In æquo.—On equity. Natural law is founded upon strict equity and justice; positive law is founded *in bono* or *utili*, for the profit and advantage of men.

In bonis.—Among the goods of a person; and property, the right to which has vested, is said to be *in bonis*.

In bonis defuncti.—Among the goods of the deceased; property vested in the deceased.

In campo.—In the field, *i.e.* before the court, and maintaining, or having an opportunity of maintaining, conflicting interests. Stair, B. 4, T. 20, § 16.

In causa.—In the cause or process; sometimes signifying, on the merits of the cause.

In clientela.—Standing in the relation of client to patron. "There was formerly a kind of bondage in Scotland, called Manrent, whereby free persons became the men or followers of those who were their patrons and defenders; and therefore these were rather *in clientela* than in bondage." Stair, B. 1, T. 2, § 12.

In commendam.—In trust. In former times, when a vacancy occurred in a benefice or living, the bishop of the diocese frequently appointed some one as steward, to levy the fruits during the vacancy. The person thus appointed, being a mere trustee, was called *commendator;* and he was bound to account for the fruits and others levied and received by him. When, however, the benefice was conferred *in perpetuam commendam*, it operated as a gift, and the commendator appropriated the fruits without being liable to account therefor. This power of appointment in the bishop was limited.

In commercio licet decipere.—Deception is permitted, or lawful, in trade. It has already been stated, that fraud or wilful deception will be a sufficient ground for the reduction of any contract or bargain to which it gave rise (see *Dolus*); and that would seem to be at variance with this maxim. The deception, however, to which this maxim refers, consists in the

exaggerated encomiums pronounced by a dealer on his goods, his endeavour to induce a belief of their value being greater than it really is, their being peculiarly adapted for a certain market, &c. In such matters the purchaser must be on his own guard, and if he allows himself to be deceived he has no legal remedy.

In communi forma.—In common form.

In computo.—In computation.

In confinio majoris ætatis.—Having nearly attained majority. Acts done and obligations undertaken by persons of such an age will in some cases be binding upon them, notwithstanding their plea of minority; and especially so, if they have stated themselves to be of full age; or perform acts affording reasonable grounds for inferring this. See *Deceptis, &c.*

In confinio minoris ætatis.—Having nearly attained minority.

In consequentiam.—As a consequence, or necessary result.

In corporibus sed non in quantitatibus.—In separate and distinct subjects, but not in things estimated in quantities. This has reference to the character of heirship moveables, which consist of the best of certain moveables belonging to the deceased, to which the heir has right. Under such right the heir may claim the best articles of furniture, the best horse, yoke of oxen, plough, &c.; but heirship moveables do not include wine, money, corn, &c., because they are fungibles, and are estimated in quantities.

In cursu diligentiæ.—In the course of doing diligence. The word, diligence, is here used in its broadest sense, including more than is usually understood by it. It includes not only personal diligence, arrestments, &c., but also adjudications, confirmations before the commissary, and generally all judicial proceedings by which property is attached or transferred.

In cursu rebellionis.—In the course of rebellion, or during the time any one was held to be a rebel. All persons were formerly regarded as in rebellion against the Crown who had been put to the horn for non-fulfilment of a civil obligation; their whole moveable estate fell to the Crown as escheat; they might be put to death with impunity; and lost all their legal privileges. If the denunciation remained unrelaxed for year and day (which was the time known as the *cursus rebellionis*),

the rebel was esteemed *civiliter mortuus*, and his heritage reverted to the superior, under the casualty of liferent escheat. Where the denunciation was for treason, the whole property, heritable and moveable, fell to the Crown. Denunciation for civil obligation and its consequences were in effect abolished by the Act 20 Geo. II., cap. 50. By the Act 1 and 2 Vict., cap. 114, it was provided that a registered execution of charge should have the effect of a denunciation; but that effect is merely to accumulate the debt and interest into a principal sum, bearing interest, and also to subject the debtor to personal diligence. The only proper denunciation that now exists is that which may proceed on a sentence of fugitation pronounced by the Justiciary Court.

In damno vitando.—Endeavouring to avoid damage or injury.

In Dei nomine.—In the name of God; the solemn invocation with which, in former times, certain official writs began, and until lately, instruments of sasine.

In detrimentum animi.—To the injury of the soul. Upon this ground persons were debarred from calling in question any deed or act, which they had made oath they would never question,—such, for example, as the judicial ratification of a deed made by a wife outwith her husband's presence. (Stair, B. 1, T. 17, § 14.) No such reason now operates as a bar by way of personal exception to the reduction of a deed. See *Extra præsentiam, &c.*

In dote æstimata.—When the dowry or tocher was valued. Under the civil law the *dos* was restored by the husband to the wife, or her relations, on the dissolution of the marriage. During the marriage he was only entitled to its fruits, and, in the general case, could not dispose of the *dos* itself. If, however, a fixed value was put upon the *dos*, the husband was entitled to dispose of it, being in such case bound to make payment of the fixed value when the marriage was dissolved.

In dubio.—In doubt or uncertainty; in a doubtful case.

In dubio pars mitior est sequenda.—In a doubtful case, the most favourable, *i.e.*, the most equitable view, is to be followed. There are several maxims and phrases to the same effect in different words, as suitable to the different cases to which they are applied. Thus:—

In dubio pro innocentia respondendum est.—In a doubtful case, the answer or decision should be in favour of innocence. On this maxim is founded a prisoner's right to the benefit of any doubt in his case, the presumption of his innocence being favoured until he is proved guilty. And,

In dubio pro possessore respondendum est.—In a doubtful case, the decision should be in favour of the possessor. In a question of disputed right the possessor of the subject must be held to have the right to it, until his opponent can shew a better title. Instances of these phrases need not be multiplied, as those already given will afford a sufficient explanation of their general meaning.

In duriorem sortem.—To the debt which it was the debtor's interest to have first discharged; that debt "which bound him fastest, or to which a penalty was adjected." Indefinite payments were so applied under the civil law. See *Durior sors.*

In essentialibus.—In the essential parts. An error in the essential parts of a deed, such as its solemnities, is fatal.

In facie ecclesiæ.—Before the church; according to the rules, or under the approbation of the church. Regular marriages are said to be so solemnised.

In faciendo.—In doing. Obligations *in faciendo* are for the performance of some act, and, as it is regarded as indivisible, where two or more persons are bound by such an obligation, each is bound for complete performance.

In facto præstando.—In the performance of some act or deed. The phrase is similar in import to the preceding one. See *Ad factum præstandum.*

In facto proprio.—Concerning a person's own act.

In favorem.—In favour of. A resignation *in favorem* was one made into the hands of a superior in favour of the purchaser who was to become the new vassal.

In fine.—Towards the end or conclusion. Used by way of reference.

In forma delicti.—In the form of a delict; or under the character of a delict. Certain prosecutions not strictly criminal must be pursued in some measure as if they were. Thus, "prosecutions for offences against the game laws must be *in forma delicti.*" Bell's Prin. § 955.

In forma pauperis.—As a pauper, or in that character. A person having a just or probable cause of suit, but who is unable to bear the expense of a litigation, is entitled to the benefit of the poor's roll, and that exempts him from the necessity of paying agent or counsel the usual fees, and also exempts him from payment of the ordinary fees attendant upon the procedure of an action at law. Such a person is said to sue *in forma pauperis.*

In forma specifica.—In the specified form; or, in the manner specified. See *Per equipollens.*

In foro contentioso.—In a contested action. A decree is said to be granted *in foro contentioso,* where the action in which it is pronounced has been litigated, and parties fully heard on the merits of the case.

In foro contradictorio.—A phrase similiar in meaning to the preceding one.

In fraudem.—In defraud of; with fraudulent intention. Thus a bankrupt is held to have acted *in fraudem* of his creditors when he grants preferences within sixty days of his bankruptcy, and such deeds are reducible on that ground.

In fructu.—Among the fruit. Whatever a *bona fide* possessor may have gathered of the fruits of his possession remains absolutely his. This applies strictly to those things which are the fruits or produce of the subject possessed, and will not extend to any part of the original subject of which he may have disposed; such part of the subject not being *in fructu.*

In graviorem causam.—This phrase is similar in meaning and application to the phrase *in duriorem sortem,* which see.

In gremio.—In the body of. Any clause, or condition, or restriction set forth in a deed, is said to be *in gremio* of it. The phrase is a common one, and has no technical meaning.

In gremio juris.—In the body of the right, *i.e.,* of the deed constituting the right. Clauses thus inserted are binding upon singular successors, but otherwise (unless they are duly recorded so as to be binding) they have not this effect. For example, a conveyance in security, properly expressed, entitles the debtor under it to demand his reinvestment in the subject conveyed on his making payment of the debt, in security of which it was granted, no matter into whose hands it

may have passed. *In gremio* of the conveyance, such a right is reserved to him. But if the conveyance is *ex facie* absolute, and there is no back letter or bond recorded qualifying the absolute disposition, a singular successor will be entitled to retain the subject in a question with the debtor, there being nothing *in gremio juris* of the creditor, or on record, preventing him disponing the subject absolutely to any purchaser.

In hæreditate jacente.—In the estate of a person deceased, which has not been entered upon or taken up by his heir. See *Hæreditas jacens.*

In hoc statu.—In this position; in the present state of matters.

In iis quæ sunt meræ facultatis nunquam præscribitur.—Prescription does not run against a mere power or faculty to act. Rights of different kinds may be lost or acquired through prescription; but the mere power or faculty of doing something, the essence of which is, that it may be done at any time, cannot be so lost. Such are, for example, an heir's power to enter upon a succession, a faculty to burden lands, the power of building on one's own property, the right to levy and exact feu-duties and casualties of superiority, although in this last case arrears may be lost by prescription.

In infinitum.—Without limit; for ever.

In initialibus.—In the preliminary stage. Questions put to a witness *in initialibus* are those put to test his competency before his examination in chief is commenced. Initial examinations, formerly very common, are now very rare, because recent changes in the law affecting evidence have abolished almost all the restrictions formerly existing as to the persons who may competently be adduced as witnesses.

In initio litis.—At the outset of the suit. All preliminary defences affecting the pursuer's title, the relevancy of the summons, competency of the action, &c., should be set forth at this stage of the process, and if subsequently stated, will not entitle the proponer to expenses.

In ipso termino.—At the very end; on the last day. A decree-arbitral may be pronounced by the arbiter *in ipso termino, i.e.*, the very day on which his office of arbiter ceases; and so prescription may be interrupted *in ipso termino, i.e.*, the last day of the prescriptive period.

In judicio possessorio—In a possessory action. A possessory action is one in which a question of possession, apart from the question of right of property, is determined. Such an action may either be for acquiring, or retaining, or recovering possession; and uninterrupted possession for seven years, entitles the possessor to a possessory judgment. For the effect of such a judgment see Ersk, B. 4, T. 1, § 50.

In jure—In right. Certain subjects consist *in jure* (termed in the civil law *res incorporales*), such as mere rights of superiority, rights of patronage, &c.; and although they are rights of property as really as any other, they are by this name distinguished from those subjects of property which are corporeal and tangible, such as houses, lands, &c.

In lecto—On death-bed. See *Ex capite lecti.*

In lecto ægritudinis—Literally, on a bed of sickness; but the phrase has generally the same signification as the preceding one, *i.e.*, death-bed. It may be taken sometimes, however, in its literal signification, for "the weakness occasioned by extreme illness, such as childbirth pains, is a relevant ground for reducing a bond or a discharge." Bell's Dict., *v. Lectus.*

In liberam baroniam—Into a free barony. In former times, many persons holding certain feudal rights from the Crown were called barons, but, in the strict legal sense, the title was only due to him whose lands had been erected or confirmed by the king *in liberam baroniam.* The advantages conferred by the right of barony were considerable. Such a right conferred on the baron both civil and criminal jurisdiction within his barony; and under the clause of union contained in his charter, he was enabled to take infeftment in the whole lands and rights of the barony in, what was at that time, an easy and inexpensive mode. The jurisdiction of barons was abolished by the Jurisdiction Act (20 Geo. II., cap. 43), except to a very limited extent: in effect, such jurisdiction is entirely abolished, although it was insisted in and given effect to in a somewhat recent case. *Tulloch,* 19 June 1834.

In liberam regalitatem—Into a free regality. Regalities were originally feudal rights of lands granted by the king, to which were attached extensive jurisdiction. In civil matters

Lords of Regality (the title conferred on those holding such grants, although commoners,) had the same jurisdiction as a sheriff; but in criminal matters their jurisdiction was more extensive, as it included even the four pleas of the Crown; they were not however competent judges in a case of treason. These jurisdictions were abolished by the Act 20 Geo. II., cap. 50.

In libero sochagio.—In free soccage. Soccage was one of the ancient tenures by which lands were held in Scotland. Under it the vassal was bound in return for the land bestowed upon him, to render agricultural services to his superior. This was intended in some measure to prevent the waste and ruin to land which was almost inevitable, on account of vassals being called away to render the military services for which, for the most part, lands were granted.

In liege poustie.—See *Liege poustie.*

In limine judicii.—At the outset of the suit. See *In initio litis.*

In linea recta.—In the direct line. Heir-of-line is synonymous with heir-at-law; and, consequently, in former times a disposition by a vassal to his heir-of-line did not incur the casualty of recognition, because his conveyance only carried the lands to him who would have succeeded to them by force of law.

In litem.—In the suit; or, regarding the subject of the suit. The oath *in litem* was that which a pursuer was entitled to emit in his own cause, in two classes of cases. "1*st*, Where there is full proof that the defender has been engaged in some illegal act, as spuilzie, or the like; and, 2*dly*, In the case of losses which a party is entitled to recover under the edict *nautæ, caupones,* &c. In either case, the oath *in litem* is conclusive as to the quantities lost; but in so far as regards the price or value put on the articles, it is subject to modification by the Court." (Bell's Dict. *voce* Evidence). The peculiarity of the oath *in litem,*—being that of a pursuer bearing testimony in his own favour, and therefore limited to the cases mentioned, where no other proof could be obtained,—no longer exists. All persons, whether pursuer or defender, may now, in the general case, be examined as witnesses in their own

actions; the oath *in litem*, as a special proceeding, may therefore be said to be entirely at an end.

In lucro captando.—Endeavouring to make gain; or to gain an advantage.

In majorem cautelam.—For greater security. Thus, where contravention of the condition of an entail, operated as a forfeiture of the contravener's right, the question might arise whether this forfeiture did not also exclude the heirs succeeding in and through him. To obviate this difficulty, Erskine says, "a clause is generally inserted in the deed, *in majorem cautelam*, that the contravener shall forfeit only for himself, but not for his descendants." (B. 3, T. 8, § 31). Such a precaution, while a very prudent one, now appears to be scarcely necessary. "The penal consequences of an act of contravention seem to be confined to the contravener, unless it is otherwise expressed." Duff's Feud. Con. 376, and cases there cited.

In majorem evidentiam.—For more sure evidence. Earnest was formerly given for more sure evidence of the completion of a bargain between the contracting parties; as, also, were arles given by a master to a servant at the time of hiring, for the same purpose. Neither of these customs are now observed, or at least, are very rarely so.

In mala fide.—In bad faith; deceitfully; dishonestly. A possessor *in mala fide* is one who holds possession of a subject, in the knowledge that it is not his own, on a title which he knows, or has reasonable ground for believing, to be a bad one. Such a possessor is bound not only to restore the subject to the true owner, but also all the fruits and profits which he has reaped during his occupancy. He is farther liable in what are called violent profits, *i.e.*, those fruits or profits which the subject was capable of producing, and which, by proper care and diligence, the possessor might have reaped.

In medio.—The property or money held by the pursuer in an action of multiplepoinding is called the fund *in medio*, because it is, or may be, subject to the claims of all the claimants, and as yet belongs to none of them. It is thus common to them all, and forms the centre or substance of the litigation.

In meditatione fugæ.—Meditating flight; intending to leave the country. A debtor, leaving Scotland, may be apprehended at the instance of his creditor, and detained until

he find caution *de judicio sisti.* He is considered *in fuga* if about to leave Scotland, although his departure may not be proved to be for the express purpose of evading his creditor's claim. Such a warrant may be obtained against a foreigner (except in particular circumstances), as well as against a native. But leaving the country in fulfilment of duty, as in the case of a soldier or sailor, is not considered *fuga*, and will not afford ground for detention on a *meditatione fugæ* warrant.

In modum pœnæ—By way of fine or penalty. Interest may almost be said to be exacted from a debtor *ex lege*, as a fine or penalty, when he is *in mora* in the payment of his debt. "Where a feu-duty is prestible in grain, the superior is entitled to such grain, of the kind stipulated, as the vassal's industry and skill enable him to raise on the lands; and in the event of non-delivery, he may exact the highest fiars prices *in modum pœnæ*." Duff. Feud. Con., 83.

In modum probationis—In the form, or by way of proof. Documents previously in process, as productions, are frequently put in by a party at a jury trial, as part of the proof on which he rests his claim for a verdict. Such documents are said to be given in, *in modum probationis.*

In nudis finibus contractus—In the bare terms or limits of a contract. Parties are said to be *in nudis finibus contractus* when the terms merely of the contract have been agreed upon, and nothing has been done by either party in consequence of, or in dependence upon it. In some cases a party may be entitled to resile from his contract while it remains in this condition.

In nudis terminis—This phrase does not admit of literal translation. It signifies a right, title, contract, &c., in the simple condition as when granted without being clothed or fortified by any subsequent act. It may be explained or illustrated by a quotation from Erskine, in which it occurs. In treating of the nature and effect of inhibition, he says:—"It is agreed by all, that proper rights of land, such as charters or dispositions, may be secured by inhibition against the deeds of the inhibited, though they continue *in nudis terminis* of personal deeds, without actual seisin." (B. 2, T. 11, § 9). The phrase is similar in import to the preceding one, *in nudis finibus, &c.*

In obligatione.—Under an obligation; by way of obligation.

In odium.—In detestation. It was at one time thought that a donation by a husband to a wife was, on her committing adultery, revoked by the operation of the law, *in odium* of her guilt. This has been decided otherwise; revocation being, even in that case, necessary on the part of the husband. *Murray*, M. 328.

In pari casu.—In a similar position. While a minor can obtain restitution against his own acts or transactions with one of full age, obligations entered into between him and another minor are binding, because they are *in pari casu*, the one being as able to act for his own interest as the other.

In pari causa potior est conditio possidentis.—In an equal case (*i.e.*, where the claimants are in a similar position), the possessor is in the better position. When one is in possession of a subject, he is not bound to cede possession to any one shewing as good a title to it as that on which he possesses. The claimant or challenger must show a better title than the possessor, for the law presumes right to possess where possession is held.

In patiendo.—In permitting, or enduring. Servitudes consist merely *in patiendo*, and consequently the servient proprietor cannot be called upon to do anything in support of the dominant proprietor's right. The proprietor having right of way through another's ground, must himself maintain the road; if his right be that of leading water (*aquæ ductus*) through another's property, he must maintain the pipes &c., necessary for that purpose.

In patrimonio principis.—In the patrimony of the prince or sovereign; a phrase synonymous with *inter regalia*, which see.

In pendente.—In suspension; not vested. The fee of heritable property is held never to be in this position. See *Dominium non potest*, &c.

In perpetuam.—For ever. Lands so granted descended on the death of the grantee to his heirs; but in the earlier periods of the feudal system, when grants of lands were given in return for service, they were generally restricted to the life of the grantee himself. See *Beneficium*.

In perpetuam commendam.—In perpetual trust. A right so granted was equivalent to a gift. See *In commendam.*

In pessima fide.—In the worst faith; dishonestly.

In petitorio.—In a petitory action. A petitory action is one in which something is sought to be decreed by the judge in respect of the pursuer's right thereto. Almost all actions are of this character.

In pœnam.—As a penalty or punishment. See *In modum pœnæ.*

In possessorio.—In a possessory suit. See *In judicio*, &c.

In potestate patris.—Under the power of the father. Children are subject to their father's power, and their property is subject to his administration during their minority. As this power is conferred by the law, so on cause shown, the father can be deprived of it. It is very limited in comparison with the *patria potestas* of the civil law.

In potestate viri.—Under the power of the husband. The husband is the legal guardian of his wife, and has the administration of her property, where such administration has not been excluded. On a judicial separation, or divorce, the husband ceases to administer, and is no longer regarded as the guardian; but a private deed of separation between the parties themselves, without judicial interference, has not this effect.

In presentia Dominorum.—In presence of the Lords. The letters I.P.D. (representing the words of the phrase) are added to the signature of the presiding Judge adhibited to any interlocutor of the Court of Session, to indicate that he has signed it in presence of the other judges, so as to dispense with the necessity of their signatures being also adhibited. A hearing *in presence*, is a hearing of counsel on a certain cause before the whole Court.

In privato patrimonio.—Among private property or patrimony. Private patrimony is that which one has or acquires for himself in his private and individual capacity as opposed to that which he holds in a public or official character.

In procinctu.—Girt for battle. Wills executed by soldiers before entering upon a campaign were privileged in many respects under the civil law. Even their nuncupative testaments were under such circumstances held valid. No such privilege is known in Scotch law.

In proximo gradu.—In the nearest degree. Children are heirs of their father in the nearest degree, and so are grandchildren when they represent their father.

In publica custodia.—In the public custody. Deeds and others held by an official for the public benefit, such as the records of Court, the records of Sasines and other writs, &c., are said to be so held.

In publicam vindictam.—For vindicating public right, or public justice. See *Ad vindictam*, &c.

In puram eleemosynam.—In pure charity. Church lands were sometimes so gifted, the difference between them and other church lands being, that for lands gifted in pure charity no return was made but prayers and supplications for the granter, and masses to be performed after his death; while other ecclesiastical fees in mortmain were held by the tenure of ward for the performance of military services by substitutes.

In quantum locupletiores facti sumus, ex damno alterius.—In so far as we have been enriched to the loss, or, by the damage, of another. In some cases persons are bound in restitution to this extent. Thus, one for whom, in his absence, another has acted (*negotiorum gestor*), must repay anything expended by that other on his (the absent person's) property, or on his behalf, for he has thereby been enriched at the other's expense. So also, an heir, although not liable for his ancestor's delict, if he has been enriched thereby, must restore to the injured person whatever he has acquired through the delict.

In quantum lucratus est.—In so far as he has gained or profited. An executor who takes up a succession in moveables, with the benefit of inventory, while not universally liable for the debts of the deceased, is liable for those debts, in so far as he has been benefited by the succession. See *Minor tenetur*, &c.

In quibus inficiando lis crescit.—In which the suit (or the sum sued for under it) increases by denial. The Romans had a class of cases which were partly *rei persecutoriæ*, and partly penal, in which, if the defender denied the pursuer's statement, he was, on its being proved, subjected in the double, triple, or quadruple value of the thing or sum claimed. Thus, where one sued another for wrongful damage (*injuria*), and the defender

denied that it had been inflicted or occasioned, he was held liable for double value, on the damage being proved. So also a depositary with whom a subject had been deposited in some urgent necessity occasioned by an accident, such as fire, &c., was held liable in double value, if, on restitution being sought, he denied that the deposit had been made.

In re communi melior est conditio prohibentis.—In common property the condition of the one prohibiting is the better. A subject held in common by several proprietors cannot be altered or interfered with other than is warranted by the common use, unless with the consent of the whole proprietors; not even if the proposed alteration should have the effect of enhancing the value of the subject. Therefore, in an action regarding any alteration on a common subject, the condition of the person prohibiting or opposing such alteration is better than that of the person desirous of and endeavouring to effect it.

In re mercatoria.—In, or connected with, a mercantile transaction. All writings *in re mercatoria* are privileged, and are held valid and binding, although wanting the solemnities common and necessary to ordinary deeds. Bank cheques, mandates, guarantees, &c., are included in this class. So, also, are bills and promissory notes, which are in themselves probative, and constitute the debt to which they refer. This privilege has been given to these documents, because of the rapidity with which, in most cases, they have to be prepared, nd the immediate use to which they have to be put, and also because, from the necessity of the case, they are generally prepared by those who are not supposed to be acquainted with the formalities and solemnities of deeds.

In re propria.—In a subject belonging to one's-self; in one's own business or affairs.

In rebus litigiosis.—In things rendered litigious. All subjects are considered litigious which have been made the subject of a law suit, or have been attached by legal diligence, such as inhibition, adjudication, or arrestment. Subjects in this position cannot be disponed or assigned to a purchaser, even if the purchase be an onerous one, for litigiosity is "an implied prohibition of alienation to the disappointment of an action or of diligence, the direct object of which is to attain the possession, or to acquire the property, of a particular sub-

ject." (Bell's Com. II. 152). Any such sale or conveyance may be reduced on this ground.

In rem suam.—Regarding one's own property; in one's own affairs. A procuratory *in rem suam* is a mandate authorising certain acts, in the carrying out of which the procurator alone has any interest or advantage. Such mandate cannot be recalled by the mandant, nor does it fall upon his death. The ordinary assignation of a debt is an example of this, in which the assigner makes over to the assignee "his whole right, interest, and title in the premises, with power to sue for and discharge the debt assigned," and so on. This procuratory or mandate is *in rem suam* of the assignee. So also is the power given to the disponee in an heritable bond, in virtue of which he may sell the subjects conveyed in security, if his debt be not paid.

In rem versum.—Employed in one's own matter; used to a person's advantage. A tutor or curator holding in his hands money belonging to his ward, without investing it or lodging it in bank, and neglecting thus to employ it for the advantage of the ward, is liable in the highest rate of interest. No action lies against a curator or guardian for the price of goods furnished to a minor which were unnecessary, and not *in rem versum*. Again, a debtor paying a debt to a curator, who has assumed the office without any title to do so, or whose appointment is not complete (as, for example, where the curator has been appointed by the Court, but not having lodged the necessary bond of caution, has not obtained an extract of his appointment), is liable in repetition on the failure or death of the curator, if the debt so paid has not been *in rem versum* of the minor.

In retentis.—Evidence taken to lie *in retentis*, is that which, in certain circumstances, is taken to be held back or laid aside, until the proper time arrives for adducing it. Such evidence is allowed to be taken at any stage of the process, on the application of either party, where there is any danger of its being lost through the extreme old age of the proposed witness, or his severe indisposition rendering life precarious, or where the witness is about to leave the country.

In rigore juris.—According to strict law.

In rixa.—In a quarrel or altercation. Defamatory words

spoken *in rixa, i.e.*, in the course of an angry altercation, are not presumed to proceed from malice, and therefore damages, if any, awarded to a pursuer on such a ground, would be merely nominal. An apology would free the defender from any claim of damages.

In sacris.—In sacred matters. The church courts have supreme jurisdiction in such matters, which involve questions of ecclesiastical discipline, scriptural doctrine, &c., *Lockhart*, 5 July 1851. This phrase must be carefully distinguished from *Circum sacra*, which see.

In solidum.—For the whole. Where there are several co-obligants bound *in solidum*, each is liable in full payment or performance, and the creditor may choose which of the obligants he will sue. Every person whose name appears on a bill, whether as acceptor or indorser, is liable in full payment of its contents, although he may after payment do diligence against the others for relief. Those who in a joint obligation are not bound for the whole, but only for their share, are said to be liable *pro rata*.

In solutum.—In payment or extinction.

In spe.—In hope, or expectation. See *Spes*, &c.

In stirpes.—Literally, among, or according to, the stocks. Succession *per stirpes* is distinguished from succession *per capita* (according to the heads, or number of persons). To illustrate this, suppose a testator to die leaving grandchildren by two sons, one of whom had left one child, the other eleven. If the testator directs his succession to devolve upon his grandchildren *per stirpes*, it would be divided into two shares, being the number of persons (or stocks, or roots) from whom the children were descended,—one share would go to the one grandchild representing his father, the other share would go equally to the eleven grandchildren representing theirs. But if the succession was directed to be distributed *per capita*, the twelve grandchildren would succeed to the estate equally.

In subsidium.—In aid of. Proper cautioners are only bound *in subsidium* of the original debtor, and consequently (where they have the right of discussion) they cannot be called upon for payment, until the debtor has been discussed. They only come to the aid or assistance of the debtor, when he has been shown to be totally incapable of discharging his own

obligation. Cautioners are now regarded more in the character of co-debtor than mere cautioner, and have no right of discussion unless it has been specially reserved to them in their obligation.

In suo genere.—Of their own kind or class. Writings *in re mercatoria* are complete and binding deeds of their kind, although deficient in the ordinary solemnities.

In suo ordine.—In his order. A cautioner who is entitled to the benefit of discussion can only be called upon for fulfilment of the obligation which he guaranteed, in his order, that is, after the principal creditor has been discussed. So, also, an heir can only be made liable for the moveable debts of his ancestor, after the executor who succeeded to the moveable estate has been discussed, and where the moveable estate has proved insufficient to meet those debts.

In thesi.—In the particular case, which has occurred; in opposition to *in hypothesi*, a case which might be supposed.

In toto.—Entirely; wholly.

In transitu.—In transit; during conveyance. If a purchaser of goods becomes bankrupt before they are delivered, the seller has the right of stopping them *in transitu*. If, however, delivery has been made to the purchaser, either actually or constructively, the goods are no longer *in transitu*, and the creditor's right ceases. It is not delivery in this sense, although the goods have been delivered to a third person, such as a shipmaster, on account of the purchaser.

In tuto.—In safety.

In utero.—In the womb; unborn. "It is a good objection to service claimed by a collateral heir, that the deceased has left a widow suspected to be with child, so long as there are hopes of her delivery." Duff's Feud. Con., 467.

In valorem.—For the value; or, according to the value. An executor confirmed by the commissary is only liable for the deceased's debts *in valorem* of the inventory given up, or rather of the estate realized by him.

Inædificatum solo cedit solo.—Anything built on the ground belongs to the ground. On the principle of this phrase, the proprietor or purchaser of land has right to everything built thereon. There are, nevertheless, exceptions to the rule, and nice questions may arise out of them. Thus, in cases between landlord and tenant, the tenant is not entitled, on

quitting possession, to remove fixtures. But where he has built on the ground an edifice, for the purpose of protecting machinery necessary for carrying on his business, both the machinery and the house will be regarded as accessories of trade, and will not fall to the landlord. Where one builds upon ground, in the belief that the ground is his own, while in reality it belongs to another, the building so erected belongs to the true proprietor of the land; but the builder will be entitled to claim from him its value, in respect of his *bona fides*.

Incerto patre.—From an uncertain father. Bastards are said to be so descended. They do not succeed to their reputed father *ex lege*, nor is any tie of relationship between them and their father's relatives admitted by the law.

Inchoatum.—Inchoate; commenced; imperfect. An arrestment may be called inchoate diligence until perfected by furthcoming; or a poinding, until perfected by sale.

Incidenter.—Incidentally.

Incommodum non servit argumentum.—Inconvenience will not avail as an argument. An act or judgment of the Court may inflict great hardship, or occasion great inconvenience to the party on whom it is pronounced, but that fact will not serve as an argument against the judgment going forth. See *Ab inconveniente*.

Incrementa.—Additions. All land that is gained by the sudden recess of the sea or river, or gradually and imperceptibly through its changes, becomes the property of the riparian proprietor, as the *incrementa* of his original property.

Indebiti solutio.—The payment of something not due. Money paid under an erroneous belief of liability therefor, may be recovered. There is a distinction to be observed between the cases, where the payment has been made under an error in law and an error in fact. This has been pointed out above. See *Condictio indebiti*.

Induciæ legales.—Days of grace allowed in legal proceedings for the performance of some act. Thus, a defender in an action before the Court of Session is allowed an *induciæ* of fourteen days, after service of the summons, before entering appearance to defend. An *induciæ* of fifteen days must elapse between the service of an indictment and the prisoner's being

called upon to plead. In the usual case, a debtor is allowed an *inducicæ* of fifteen days to fulfil a charge of payment on a decree before personal diligence can proceed, &c.

Inest de jure.—It is implied in the right. The right to build upon land does not require to be expressed in the titles, for *inest de jure*,—it is inherent, according to law, in the right of property. For the contrary reason, restrictions on the exercise of the full right of property must be expressed. *Inest de jure* applies to any right which the law recognises, or infers to exist under certain circumstances, unless that right has been taken away by private paction.

Infamia facti.—Infamy arising from general bad character, which may affect, when proved, the credibility of a witness, but affords no ground for excluding his testimony.

Infamia juris.—Infamy arising from a legal conviction for crime. This at one time disqualified all persons as witnesses against whom it could be proved, but the disqualification (except where the infamy arose from a conviction for perjury or subornation) was removed by the Act 1 Will. IV., cap. 37. Exclusion of evidence on account of the infamy of the proposed witness has been entirely abolished by the Act 15 and 16 Vict., cap. 27.

Infantiæ proximus.—Next to infancy. A child is said to be next to infancy until it arrives at the age of seven years, and during this period the mother is entitled to the custody of it.

Infeudatio.—Infeftment; investiture. "The (original) meaning of the word *infeftment*, so frequently used in relation to feudal conveyancing, differs considerably from that of *sasine*. Infeftment was originally employed to denote those deeds, whether charter or sasine, disposition sasine and confirmation, or other titles of investiture, whereby a feudal right is completed. It still occasionally bears the same meaning, but more generally denotes the ceremony of infeftment. The word sasine often occurs in the latter sense,—to give sasine, meaning the same as to give infeftment; but it usually means the instrument of sasine, and never the whole title or investiture." (Duff's Feud. Con., 57.) "The word (*infeudatio*) is frequently used for the charter alone, in the *Regiam Majestatem*. and the other old books of our law." (Ersk., B. 2, T. 3, § 18).

Ingenui.—The name given among the Romans to free persons, who had been born free, and had never lost their freedom, as distinguished from *libertini*, persons who had obtained freedom by manumission.

Inhærere jurisdictioni.—To be necessarily connected with jurisdiction. This is said of *imperium mixtum*, because, while it included the power of declaring as well as enforcing the law, *imperium merum* was only the power of carrying out or executing sentences. See both of these phrases, *supra*.

Initialia testimonii.—The initial or introductory part of the deposition of a witness. See *In initialibus*.

Injuria.—Injury or damage wrongously inflicted; any wrongful act. See *Damnum absque, &c.*

Innovata lite dependente.—Innovations or alterations during the dependence of the suit. Referring to interference with a subject after it has been rendered litigious. See *Pendente lite, &c.*

Inspectio corporis.—An inspection of the person. In some cases such a proceeding is allowed, and the result of such inspection received as proof; as, for example, in criminal prosecutions for child murder, and concealment of pregnancy. It is only admitted, however, in cases of the most urgent necessity. See *Davidson*, 11 Feb. 1860.

Instantia perit.—The instance falls or perishes. When a defender puts up protestation against the pursuer, for not enrolling, or not insisting, the instance perishes and the process is dismissed. This does not in any way affect the merits of the pursuer's case, who is entitled to cite the defender again for the same claim. In the same way, in a criminal indictment, where the prosecutor does not insist in his libel at the diet to which the prisoner has been cited, *instantia perit*, but the prosecutor may have the prisoner recommitted, and serve him with a new indictment.

Institor.—The person to whom the immediate management of a shop, business, or undertaking has been committed by the master or owner, and for whose acts in that capacity the master is liable. See *Actio institoria*.

Instrumenta noviter reperta.—Instruments newly or subsequently discovered. See *Ex instrumentis, &c.*

Inter conjunctas personas.—Between conjunct persons.

By the Act 1621, cap. 8, all conveyances or alienations between conjunct persons, unless granted for onerous causes, are declared, as in a question with creditors, to be null and of no avail. Conjunct persons are those standing in a certain degree of relationship to each other, such, for example, as brothers, sisters, sons, uncles, &c. These were formerly excluded as witnesses on account of their relationship, but this as a ground of exclusion has been abolished.

Inter eosdem.—Between the same persons.

Inter naturalia (feudi).—Among the things naturally arising from a feu; such as the payment of the feu-duty, the rendering of the stipulated services to the superior, &c. These are binding upon all heirs and singular successors. Regarding the question of how far stipulations not *inter naturalia* are binding upon singular successors, see Bell's Prin. § 861.

Inter regalia.—Among the things belonging to the Sovereign. Among these are rights of salmon fishing, mines of gold and silver, forests, forfeitures, casualties of superiority, &c., which are called the *regalia minora*, and may be conveyed to a subject. The *regalia majora* include the several branches of the royal prerogative, which are inseparable from the person of the Sovereign.

Inter rusticos.—Among rustics or illiterate persons. Deeds or obligations granted *inter rusticos*, are not judged of by the same strict rules as those prepared by professional men with all the usual technicalities, and containing all the necessary solemnities. They are dealt with more according to equitable principles than rules of strict law.

Inter virum et uxorem.—Between husband and wife. See *Donatio inter virum*, &c.

Inter vivos.—Between living persons. An ordinary deed importing obligation or conveying property, is called a deed *inter vivos;* in opposition to a will bequeathing moveables, or a deed conveying heritage to take effect only on the granter's death, which are called deeds *mortis causa*.

Interest reipublicæ, ne quis re sua male utatur.—It is for the interest of the State, that no one shall use his property improperly. On this maxim, the law interposes to prevent any one using his property wantonly to the injury of his neighbours, or of the public generally. Thus where the use

property is put to, creates a nuisance, it may be interfered with, and the nuisance removed; or where a proprietor without benefitting himself uses his property to the injury of his neighbour, he is presumed to be acting *in æmulationem vicini*, and his proceedings may be interdicted. The Statute 39 and 40 Geo. III. cap. 98 (known as the Thellusson Act), is a farther illustration of this maxim. By it a restraint is imposed upon all trusts, deeds, or wills, whereby the profits or produce of real or personal estate is directed to be accumulated, and the beneficial enjoyment thereof postponed beyond twenty-one years. Such accumulation and postponement are obviously impolitic, and therefore the law regards the testator's direction to accumulate in this manner, as *pro non scripto*. See the application of this statute in a recent case, *Lord*, 7th Dec. 1860.

Interim dominus.—Proprietor in the meantime. A widow is *interim domina* of terce lands after her service, and in virtue thereof may either possess them herself, or let them out to tenants.

Intra familiam.—See *Extra familiam*.

Intra triduum.—Within the space of three days. It was formerly a rule of our law that a seller was entitled to the restitution of goods delivered to, but not paid for by the purchaser, if the latter became bankrupt within three days of the transaction. This was founded upon the presumption that his impending bankruptcy must have been known to the purchaser, and that he was guilty of fraud in not communicating it. This rule was overturned, and the doctrine of stoppage *in transitu* (which had long previously existed in the English law) introduced in its place, for the first time by the decision of the House of Lords in the case of *Allan, Stewart, and Co.*, 23 Dec. 1790. M. 4949.

Intuitu matrimonii.—In the prospect of marriage. Deeds granted between the spouses in the prospect of marriage, are considered onerous, if the marriage follows.

Intuitu mortis.—In the prospect of death.

Intus habet.—The law "presumes, till accounting, that the tutor *intus habet*, or, in other words, that he hath in his own hands as much of the pupil's money unaccounted for as will balance the claim he has against the pupil." Ersk., B. 1, T. 7, § 32.

Inurit labem realem—Brands it with a real defect. Theft has such an effect on the thing stolen, for it attaches such a real defect to the subject, that no possession, for whatever length of time, nor onerosity in acquiring it, can possibly make the possession good, or sufficient to resist the demand for restitution, if made on the part of the rightful owner. Forgery also has this effect, for although in the case of a bill, the plea of no value would be good if stated against the original holder, it cannot be successfully maintained against an onerous indorsee; yet if the signature be a forgery this attaches such a real defect to the bill, that it may be maintained against any one suing on it, no matter what may be the character in which he sues. See *Labes realis.*

Invecta et illata—Literally, things brought or carried in, and commonly used to signify a tenant's furniture and plenishing, over which the landlord has a right of hypothec.

Invito debitore—Without the consent, or against the wish of a debtor. The creditor may assign or discharge his debt *invito debitore.*

Invito superiore—Without the consent or against the wish of the superior. It was for a long time a doubtful question whether a vassal could *invito superiore,* renounce his feu, to the effect of freeing himself from the payment of future feu-duties, or future performance of those services in return for which he held his feu. It was ultimately decided that he could not; and the same rule applies to a disponee who has adopted the feu right. *Hunter,* 16 Dec. 1834. Where the lands are burdened with payment of a ground-annual, the conveyance of the lands does not free the original vassal from his personal obligation to pay the same, nor does it impose a personal obligation on the disponee to pay it. *Millar* (H. of L.) 17 Mar. 1853, (reversing the judgment of the Court of Session); and *Gardyne* (H. of L.), 13 May 1853. The personal obligation of the original vassal remains, and the lands are liable for his fulfilment of that obligation into whose hands soever they may have come.

Ipso jure—By the law itself.

Ipsum corpus—The thing itself. Under the contract of commodate, the borrower must return the very subject borrowed, and if it should have perished through no fault of

his, no liability for the subject or its value attaches to him. Under *mutuum* it is different; for, there, the borrower is liable, whatever happens, for the equivalent of the thing borrowed. Again, where a testator bequeaths a specific legacy, the *ipsum corpus* must be delivered to the legatee, and if it perishes, the legacy falls, and the legatee has no claim for its value. On the other hand, such a specific legacy suffers no diminution as other legacies do, where the estate of the deceased is insufficient to meet all the legacies he may have, by his testament, directed to be paid.

Is qui dolo malo desiit possidere, pro possessore habetur.—He who has fraudulently ceded possession, is still held to be the possessor. The true owner of a stolen subject is entitled to recover it wherever it can be found, and any one in possession of it, is bound to restore it, even although he acquired it *in bona fide*, and for a fair price. If such possessor has again sold it, still *in bona fide*, he is only liable to the owner in that which he has received for it, in excess of that which he himself paid. But, if, knowing the true owner, the possessor of such a subject has fraudulently quitted possession, that he might not be called upon to restore it, he is held by law to be still the possessor, to the effect of rendering him liable for its value.

Is qui omnino desipit.—He who is altogether void of reason. The definition of a fatuous or insane person, as distinguished from one who is merely of weak intellect.

Iter.—One of the rural servitudes, importing a right of way on foot or horseback, in favour of the dominant owner through the servient proprietor's lands; sometimes termed the *jus eundi*.

J

Jacere telum voluntatis est; ferire, quem nolueris, fortunæ.—To throw a dart or weapon is a matter of will; but that it strike a person whom you have no wish or intention to strike, is a matter of chance. This phrase is quoted by Erskine from Tully, while treating of the principle that malice or dole is essential to the commission of crime. "If a huntsman who aimed a dart at a roe or a buck, should casually kill a man who happened to be passing by, chance alone is to be blamed, not the huntsman." *Ersk.* B. 4, T. 4, § 5.

Jactus lapilli.—The throwing down of a stone. One of the modes under the civil law of interrupting prescription. Where one person was building on another's ground, and in this way acquiring a right by *usucapio*, the true owner challenged the intrusion and interrupted the prescriptive right by throwing down one of the stones of the building before witnesses called for the purpose.

Jactus mercium navis levandæ causa.—The throwing of goods into the sea for the purpose of lightening the ship; jettison. Where goods are thrown overboard in a storm to ensure the safety of the ship and remainder of the cargo, the owners both of the ship and cargo saved, are liable *pro rata* to the owner of the goods thus thrown out, for their value. This equitable rule of law is borrowed by us from the civil law (*Lex Rhodia de jactu*) and is adopted, under several modifications, by all the commercial countries in Europe.

Jactus retis.—The cast of a net. This may form the subject of a valid sale, although a mere *spes*.

Judicatum solvi.—That the decree will be implemented. This is a species of caution formerly required of all defenders

in maritime actions, although it cannot now in ordinary circumstances be required of any defender domiciled in Scotland. The cautioner in such an obligation is bound in payment or fulfilment of whatever may be decerned for, and he is not liberated from the obligation by the death of the principal debtor. It is a kind of caution not frequently required. Under the civil law this caution was required of any defender who remained in possession, during the suit, of the subject which gave rise to the dispute. The cautioner was there liable to pay whatever was contained in the *condemnatio*, and he also guaranteed that the defender should use no fraud.

Judices dati.—Judges given or appointed. Under the second system of legal process among the Romans with which the civil law has made us acquainted, the system namely of the *formulæ*, all cases were first brought up before the Praetor. The real question between the parties was settled and defined by him, and sent for judgment under his instructions to the judge appointed, who might be chosen by the parties. This judge was called the *judex datus*. The question to be decided, and the instructions of the Praetor thereanent, were contained in the *formula*, and beyond it the *judex* could not go, without invalidating his decision. The *formula* of the civil law bears a striking assimilation to the issue of the present day, and a copy of it may not be without interest to many. It ran thus (Gaius, B. iv. § 40-43): "Let N. be the judge. Whereas Aulus Agerius sold a slave to Numerius Negidius; if it appears that N. N. ought to give (or is due) A. A. ten thousand sesterces, let the judge condemn N. N. to pay the ten thousand sesterces to A. A.; if it does not so appear, let the judge acquit him." If the defender pleaded an exception, then (instead of the last clause here given) the *formula* concluded thus: "Unless the obligation was extorted through fear," or, "was obtained through fraud," as the case might be. See *Ope exceptionis*.

Judices pedanei.—A class of inferior magistrates among the Romans who had jurisdiction in cases not exceeding in value, three hundred *solidi*. They differed from the ordinary judex in this, that they determined both the law and the fact, and cases sent to them by the superior magistrates were not accompanied by any *formula*.

Judicis est jus dicere non jus dare.—It is the part of the judge to enunciate, not to give or make law. Judges, as such, have no power of legislation, and their power is limited to the mere administration of that which has already been declared law by the proper authority. The power vested in the Judges of the Supreme Court, in virtue of their *nobile officium*, of pronouncing what has not hitherto been held as law, is no violation of this maxim. In exercising that power, they merely exercise a certain discretion in the equitable administration of justice, and it has only reference to the particular case before them. They have no such discretion where the law is clear and fixed, nor do such decisions in equity form absolute precedents.

Judicio sisti.—To be forthcoming to answer to the suit. This is a species of cautionary obligation, under which the cautioner binds himself that the principal shall appear at all diets of court, when his presence shall be required by his opponent. In case of failure, the cautioner becomes liable for the amount contained in his bond of caution, which is generally the amount of the debt sued for. The cautioner may free himself of his obligation at any time by producing the principal in court (after due intimation to the other party), and stating that he will be no longer liable for his appearance. The principal will then require to find another cautioner, to prevent his being personally detained. This kind of caution is required of those persons who have been apprehended as *in meditatione fugæ;* but is most frequently used in the cases of persons apprehended on a criminal charge, who are liberated on finding caution, to the extent of a certain sum, for their appearance, to answer to that charge when preferred against them.

Jura eodem modo destituuntur quo constituuntur.—Rights are abandoned or discharged in the same manner as that by which they are constituted. Thus, a contract, with the rights and obligations arising out of it, depending upon the consent of parties (as in sale), may be abandoned or discharged by mutual consent; but a bond for money, or any right which requires to be constituted by writing, must be discharged in writing. An exception to the last illustration may be found in the case of rights constituted by bill or promissory note,

which, although constituted by writing, may be abandoned or discharged by the mere delivery of the document of debt, without any written discharge of it. Such documents are *in re mercatoria*, and privileged.

Jura fixa—Immoveable (*i.e.*, heritable) rights.

Juramento—By oath. A limited kind of proof, which, however, may be resorted to in all cases by either of the parties under the form of a reference to the oath of the opponent. See *Scripto vel juramento*.

Juratores—Jurors; so called on account of their being required to swear (*jurare*) that they will give their verdict according to the evidence laid before them.

Jure accretionis—By right of accretion. Accretion is a mode of validating a right or title in the person of the possessor, by some act on the part of that possessor's author, and it may be illustrated by a very familiar example. If A, having only a personal title to lands, dispones them to B, granting precept for infeftment, any infeftment following upon that precept will be invalid, because the warrant on which it proceeds flows *a non habente*. But if A subsequently feudalises his title by infefting himself, this subsequent act, *jure accretionis*, will validate the precept which he granted to A, and the infeftment which followed upon it. Such accretion acts *retro*, and validates the deeds otherwise invalid, as of their own respective dates.

Jure devolutionis—By right of devolution. See *Jus devolutum*.

Jure proprio—By his or their own proper right.

Jure sanguinis—By right of blood. A heir succeeds to hereditary titles, heirship moveables, &c. *jure sanguinis*, and no service is necessary to vest him with the right to them.

Juri sanguinis nunquam prescribitur—No prescription runs against a right by blood. This maxim, taken from the civil law, imports "that the right of relationship, being a personal right, is not lost *non utendo*. It is not to be understood, however, that one cannot, by prescription, establish his right to a subject which another claims in virtue of his right of relationship. Thus, after the lapse of the vicennial prescription of retours, the party served, although not the true heir, may exclude him. All that is meant is, that if no other

heir has been entered, the right of blood is not lost by the negative prescription, but that a person may enter heir to his predecessor, although he died centuries ago." Bell's Dict., *h. v.*

Juris divini.—Of divine right; consecrated to God. Churches, communion-plate, &c., are said to be *divini juris*, and, so long as dedicated to sacred purposes, cannot be the subjects of commerce, or be applied to the uses of private property.

Juris privati.—Of private right. All private property is so termed, as opposed to property held for the public benefit. Property held by a corporation for behoof of its members, however numerous, is reckoned *juris privati*, because it partakes of the character of a private trust.

Juris publici.—Of public right. All property held for the benefit of the people generally, and of which they are entitled to the common enjoyment, is said to be of public right. Such are, navigable rivers, the sea shore, &c., held by the Crown for the public behoof. All other rights of a similar character are *juris publici*.

Jurisdictio contentiosa.—Contentious jurisdiction. The Romans divided jurisdiction into two branches, voluntary and contentious, the distinction between which cannot be better explained than by quoting the words of Erskine on this subject:—"Voluntary (jurisdiction) was that which was exercised in matters that admitted of no opposition. Contentious had place in all questions truly debateable, which were in their nature capable of receiving a judicial discussion. A decree, therefore, upon a point which might have been the subject of dispute, though, in fact, pronounced in absence of, or without opposition from the defender, was *jurisdictionis contentiosæ* The essential differences between the two were, that voluntary jurisdiction might be exercised by any judge, and upon any day, and in any place; whereas acts of contentious jurisdiction must have been performed *pro tribunali*, or in court, and upon a lawful day, and by that judge alone who was competent to the cause. The judicial ratifications of women clothed with husbands may be accounted *voluntariæ jurisdictionis* by the law of Scotland; for they may be proceeded in by any judge, even *extra territorium*." Ersk. B. 1, T. 2, § 4.

Jurisdictio in consentientes.—Jurisdiction in a judge over parties by virtue of their consent; prorogated jurisdiction.

Jurisdictionis fundandæ causa.—For the purpose of founding jurisdiction. See *Arrestum, &c.*

Jurisdictionis voluntariæ.—Of voluntary jurisdiction. See explanation of voluntary jurisdiction, and wherein it differs from contentious jurisdiction, above, *Jurisdictio contentiosa.*

Jurisprudentia.—Jurisprudence; or, a knowledge of the law. Jurisprudence is defined by Justinian in his Institutes, as "the knowledge of things divine and human; the science of the just and of the unjust."

Jus.—This word signifies either law or legal right. In the civil law it is used to signify the unwritten law established by custom (derived from *jubeo*), while *lex* signified the written law (from *lego*).

Jus accrescendi.—The right of accrescence. This phrase is used, although rarely so, by Scotch law writers. to signify the right of accretion, by which a title, formerly invalid or challengeable, is fortified by some supervening right acquired by the author who granted it. That right is more correctly expressed by the phrase *jus accretionis.* The present phrase is one borrowed from the civil law, and has reference to the rights of co-legatees, some of whom had the right of succeeding to the share of a co-legatee on his failure, others of whom had not. This right depended on the terms of the will; and while it would occupy too much space to state and illustrate here the rules on which these rights depended, yet these may be briefly mentioned. Co-legatees were said to be conjoined, either (1) *re,* (2) *re et verbis,* or (3) *verbis.* They were conjoined *re,* where the same subject was bequeathed to each, but bequeathed in separate and distinct sentences of the same testament; as where the testator provided: "I leave my house Z to A;" and in the same testament also provided: "I leave my house Z to B." In such a case it depended entirely upon the peculiar mode in which the thing was bequeathed, whether the heir was bound to give to one of the legatees the subject itself, and to the other the full value of it, or only bound to make delivery of the subject to the legatees jointly. But (apart from any question with the heir) it is evident that on the failure of any of the legatees so joined, there could be no

room for the *jus accrescendi*, since to each legatee the whole subject was bequeathed. So, a surviving legatee taking the whole on the failure of his co-legatee, rather avoided a diminution than received an addition to his legacy; and on this account his right was termed by some civilians, the *jus non decrescendi*. (2.) Some legatees were conjoined *re et verbis*, *i.e.*, both as regards the subject of the legacy, and in the same sentence, or provision of the testament. "I leave my house to A. and B." is an instance of such conjunction; and under such a provision, on the failure of one of the legatees, the whole subject became the property of the other, by virtue of his *jus accrescendi*. (3.) There was no additional right accresced to the survivor on the failure of a co-legatee joined with him only *verbis*. In such case, the legatees were only conjoined in so far as their legacies were bequeathed in the same sentence; as where the testator provided, "I bequeath such a piece of land to A. and B., each to have a half." Here there is no unity of interest between the legatees; their legacies although bequeathed in the same sentence, are distinct and separate bequests, and, therefore, between such legatees there is no room for the application of the *jus accrescendi*. Correctly speaking, the *jus accrescendi* only applied in the cases of joint legatees who were conjoined *re et verbis*.

Jus ad rem.—The right to a subject; a personal right. See *Jus in re*.

Jus antiquum.—The old law. The older Roman law was so called.

Jus apparentiæ.—The right of apparency. In ordinary phraseology, an heir apparent is the person upon whom a certain succession will probably devolve; as, for example, the eldest son is heir apparent to his father. Technically, an heir apparent is one to whom the succession has already opened, but who has not completed his title to his predecessor's estate, either by service or precept of *clare constat*. His right of apparency entitles the apparent heir to draw the rents of the estate, and pursue for them if necessary. He is also entitled to reduce death-bed deeds, or defend his ancestor's title if challenged. The acts or deeds of an heir apparent are not effectual as against the estate or the next heir, unless he shall have possessed on his apparency for three years.

Jus civile.—The civil or Roman law. Law was divided by Justinian (Inst. B. 1, T. 1, § 4) primarily into two branches, public and private. The *jus publicum* (or public law), had reference to the constitution of the State, its relations with its members, civil administration, and, among the Romans, it regulated religious worship; while the *jus privatum* (or private law) regulated the reciprocal rights and duties of individuals. The latter was subdivided, in reference to the sources from which it was derived, into three branches—(1.) The *jus naturale*, or natural law taught by nature to all animals; (2.) The *jus gentium*, or law of nations, being the law established by natural reason among all men, and acquiring its name because of its observance among all civilised nations; and, (3.) The *jus civile*, or civil or municipal law, being that which any people constitutes for itself, differing from the two preceding branches in this, that while they are common to and binding upon all persons, the civil law is only obligatory upon the citizens of that country where it has been constituted or set up. *Jus civile*, occurring in works on Scotch law, invariably refers to the civil law of Rome. It will be observed that the signification attached by Justinian to the title *jus gentium* is entirely different from that which now attaches to it. With him it signifies, those principles of right dictated by reason to all men (which modern writers term *natural law*); with us, the *jus gentium* signifies those rules which form the basis of one nation's dealings with another, or international law.

Jus coronæ.—The right of the Crown; under which the Sovereign is entitled to claim those things which are regarded as *inter regalia*.

Jus crediti.—The right of credit, *i.e.*, the right of a creditor. This signifies the right in a debt or obligation vested in a creditor. The phrase is used frequently in contradistinction to a mere *spes* or expectancy; the one being a right which can be made effectual by legal process, while the other cannot. For example, when property is conveyed in trust for behoof of certain beneficiaries, although the trustee is legally vested in the property, yet the beneficiaries have a *jus crediti* therein which cannot be affected by the trustee's debts or deeds, and under which they can compel him to administer in terms of the provisions of the trust-deed.

Jus devolutum.—A devolved right. When a church living or benefice becomes vacant by the death of the incumbent or otherwise, the patron is bound to present to the presbytery a fit person to supply the cure, within six months of the vacancy occurring. In the event of the patron's failure so to present, the right of presentation devolves upon the presbytery, and this right is called the *jus devolutum*.

Jus dominio proximum.—A right very near, or nearly equal to, that of absolute property. Such a right is enjoyed by one who holds lands in feu, for he is entitled to sell the subjects, or alter or use them in any way he thinks proper. And yet the property is not absolutely his, that is, he does not hold the property so absolutely as did the superior from whom he acquired, because the land is burdened with the feu-duty payable to the superior, and to this extent the absolute right of property is restricted. Similar to the right of a feuar under our law, was that of the *emphyteuta* under the civil law.

Jus exigendi.—The right of demanding or enforcing fulfilment. A creditor may have an unquestioned *jus crediti*, and yet not have the *jus exigendi*, for a debt may be due and yet not be exigible. For example, where a testator directs his testamentary trustees to pay a certain legacy which he has unconditionally bequeathed to the legatee, six months after his (the testator's) death, the legacy vests on the death of the testator and the legatee acquires then the *jus crediti*, but he cannot enforce payment of the legacy until after the expiry of the six months; he acquires the *jus exigendi* when the debt has become prestable.

Jus gentium.—The law of nations; international law. For the different signification attaching to this phrase under the civil law, see *Jus civile*.

Jus gladii.—Literally, the right of the sword; the name given in the civil law to the right or power of executing criminal sentences.

Jus incorporale.—An incorporeal right. In the civil law, rights were divided into corporeal and incorporeal, a division adopted by the law of England, but not much regarded in the law of Scotland. The subject of a corporeal right is that which may be seen and handled, as a horse, a house, land, &c., while the subject of an incorporeal right is one that does

not fall under the senses, as a right of patronage, of superiority, &c.

Jus individuum.—An indivisible right. Such rights are those which can only be exercised by one person, as the right of superiority. Heirs-portioners each possess a *jus individuum* in the lands to which they succeed, as each has a right not to an equal portion of the lands, but an equal right in every portion of them.

Jus in re.—A right in a thing; a real right. This kind of right is generally spoken of as opposed to a *jus ad rem*, which merely implies a right to demand delivery or possession of a subject, without enabling the holder of it, to vindicate possession against all and sundry. The difference between the two rights may be simply illustrated. No one possessed of the *jus in re* in any subject can be deprived of his right of property therein, except with his consent or by legal process. If it should be stolen from him, he may claim it wherever he may find it, even if in the hands of a *bona fide* purchaser. Or, if one purchase from another certain goods and pay the price thereof, he thereby acquires a *jus in re* in the goods bought, which cannot be defeated by the seller's creditors on his bankruptcy, although the goods are still in the seller's custody. This was not so previous to the passing of the Mercantile Amendment Act (1858), for until then, no property in the sold goods passed to the buyer until delivery was made. A *jus in re*, therefore, is such a real right in the subject itself, as cannot be defeated. A *jus ad rem*, on the other hand, is a mere right to sue for fulfilment of an obligation without any right to vindicate possession of the actual subject. Thus, if B. engages and binds himself to make delivery to A. of a certain subject, which however in violation of his obligation he sells and delivers to C., the right of A. being merely a *jus ad rem*, he cannot recover the subject from C., and can only sue B. for the delivery, and on failure in that, for damages on account of breach of contract. Such a right, therefore, is merely personal, and is not absolute but defeasible.

Jus mariti.—The right of a husband. The *jus mariti* invests the husband with the uncontrolled power of administration of the goods in communion. It enables him to sue for, recover, and discharge moveable debts due to his wife, or

they may be attached for his debts by the husband's creditors; and, reciprocally, it renders him liable for all his wife's debts. This right entitles the husband, even after the dissolution of the marriage, to recover those things which fell under the *jus mariti* during its subsistence. It may be partially, or wholly, renounced.

Jus nobilius.—The nobler or superior right. Where a debt is made heritable by being secured upon land, it does not become moveable by the subsequent granting of a personal bond of corroboration or bond of cautionary. This may make the debt more secure, but does not alter its character,—the subsequent obligation being considered an accessory of the heritable right which in such a case is the *jus nobilius*.

Jus non decrescendi.—The right of not suffering diminution. See *Jus accrescendi*.

Jus non patitur idem bis solvi.—The law does not suffer the same thing to be paid twice. Any such repetition of payment will found an action for restitution. A payment may be made under an erroneous belief of obligation therefor, and yet the person paying it have no claim for restitution. This may happen in a variety of cases, but it cannot happen where the debt has been twice discharged.

Jus novum.—The new law. The more modern Roman law was so called as distinguishing it from the older law, which was termed the *jus antiquum*.

Jus obligationis.—A right of obligation, or personal right. Similar to a *jus ad rem*, which see.

Jus pascendi pecoris.—The right of pasturing cattle. This is one of the rural servitudes whereby the proprietor of the dominant tenement is entitled to pasture a determinate number of his cattle on the grass grounds of the servient tenement. The right may be acquired by express grant, or by prescription.

Jus persequendi in judicio quod sibi debetur.—The right of suing before a judge for that which is due to us; being the definition of an action, given by Justinian in his Institutes (B. 4, T. 6, Pr.). Proceedings before a *judex* were said, by the Romans, to be *in judicio*, while those before the Praetor or other magistrate were said to be *in jure*.

Jus pignoris.—The right of pledge. A creditor, with whom any subject has been pledged by his debtor in security

of his debt, is entitled, under his *jus pignoris*, to retain that subject, until the obligation, in security for the fulfilment of which it was given, has been fulfilled. If, however, the creditor has lost possession of the pledge, his *jus pignoris* will not entitle him to recover it.

Jus prætorium.—The Praetorian law, or law of the Praetors. This consisted of the edicts which it was the custom of each Praetor to publish on his entering office, declaring the rules on which he would proceed in various given cases; and also of the perpetual edicts which were held as forming part of the common law. (See *Edictum perpetuum*). The Praetorian law was sometimes termed the *jus honorarium*, or honorary law, because it was made or promulgated by magistrates *qui honores gerebant* (who bore magisterial honours), the word *honores* signifying offices entitling the holders of them to certain external marks of dignity.

Jus præventionis.—A right of preference. Where two courts are equally competent to judge in a certain cause, that court which exercises the first act of jurisdiction has a preferable right of jurisdiction to judge in it, to the exclusion of the other. This right is said to arise *jure præventionis*, because the court first exercising jurisdiction prevents, or comes before, the other court.

Jus quæsitum.—An acquired or vested right.

Jus quæsitum tertio.—A right vested in, or acquired by, a third party. Where, in a contract between certain parties, a stipulation or provision is made in favour of a third, who is not a party to the contract, the right thus created is called a *jus quæsitum tertio*. Thus, under an antenuptial contract, where certain provisions are made in favour of trustees for behoof of the children of the marriage, without any power reserved to the spouses to alter their contract, a *jus quæsitum tertio* is created in favour of the children. So also in a trust-settlement, such a right is created in favour of the beneficiaries, for whose behoof the trustees are appointed.

Jus regale.—A royal right, or right belonging to the sovereign. See *Jus coronæ*.

Jus relictæ.—The right of the widow. This phrase signifies only the right which the widow has in the moveable estate of her deceased husband, and is never applied to any of her other rights. The *jus relictæ* entitles the widow to one-third of her

deceased husband's moveable estate, where there are children of the marriage existing, and one-half of that estate where there are no children. This right cannot be defeated by the husband's testament; nor is it presumed to be discharged by other provisions which the husband may have made in favour of his widow.

Jus representationis.—The right of representation; or that right by which a son or other relative succeeds to the rights and privileges of a person deceased. By this right the son of an eldest son succeeds to the estate of his grandfather, in preference to the grandfather's surviving younger sons, because, in virtue of this right, the grandson representing his father, is regarded as *eadem persona* with him, and, by the law of primogeniture, is preferred to the succession. Formerly, the right of representation was only permitted in successions to heritage, but it was extended to moveable succession by the Act 18 Vict., cap. 23 (1855).

Jus retinendi et insistendi.—A right of retention, and of insisting or suing. Seamen have these rights in reference to the recovery of their wages,—the right of retention or lien over the ship in security, and the right of proceeding against both the owner and the ship for payment. Even where the ship has become a wreck, the seaman's right of lien exists over what may remain of it.

Jus sibi dicere.—To declare the law for himself, *i.e.*, to take the law into one's own hand. Where any one in the lawful possession of a subject, has been deprived of it by violence or other illegal means, he is not entitled to take the law into his own hands, and, by violence or other illegal means, repossess himself of it. If he should do so, he will, in any competition regarding it, be ordered *ante omnia* to restore it to the person from whom he took it, even were he in a position instantly to instruct his sole right to it. While, however, the law forbids any one to recover by violence, it does not forbid a possessor retaining by violence what is attempted to be taken from him violently. Such retention cannot be said to be *jus sibi dicere*.

Jus superveniens auctori accrescit successori.—The supervening or subsequently acquired right of an author accresces to his successor. This maxim is borrowed from the civil law,

and is the basis of the Scotch law doctrine of accretion. See *Jure accretionis.*

Jus tertii.—The right of a third party. Where any one in an action at law propones pleas, or advances arguments, which he has no title or interest to maintain, he may be met by the reply, that such pleas are *jus tertii* to him. Thus, where a tenant assigns a lease, in which assignees and subtenants are expressly excluded, although the landlord, for whose benefit this restriction has been introduced, may object to the assignation as a contravention of the terms of the lease, it is *jus tertii* to the creditors of the tenant to object thereto upon that ground.

Jus utendi fruendi.—The right of liferent, called in the civil law usufruct. The usufructuary or liferenter has the right of using and enjoying the subject over which this right is constituted, and this includes the gathering and consuming of the fruits of the subject. The difference between a liferenter and a proprietor is, that the latter has the right of disposing of the subject itself, which the former has not.

Justitia.—Justice; defined by Justinian to be, "the constant and perpetual desire to render every one his due." (Inst. B. 1, T. 1, Pr.).

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Labes realis quæ rei inhæret.—A real defect, which attaches to the thing. There are some objections to a contract or a document of debt, which can only be urged effectually by certain parties against certain others, but a real defect is one that can be pled by any one. Thus, the defence of no value, in an action on a bill, is a good defence by the acceptor when pursued by the drawer, but will not be successful if urged against an onerous indorsee. The objection is personal, and constitutes no real defect in the bill itself. But the defence that the alleged document is a forgery is good against any holder, whether he be an onerous holder or not; it is a real defect, which renders the bill void. Again, where a debtor binds himself, along with a cautioner, in a personal bond for a sum of money therein mentioned, both principal and cautioner are free, if it can be shewn that the principal obligation was obtained by force or fraud; and that, even where the cautioner is bound as full debtor, and no force or fraud has been used in obtaining his obligation. The force or fraud used is a real defect vitiating the principal obligation, and when it falls, the accessory obligation falls also. Theft, also, constitutes a *labes realis* in the title of any one holding the subject stolen, no matter how honestly he may have acquired it; and on this defect, which attaches to it until it return to his possession, the true owner may vindicate his right, and recover his subject wherever it can be found.

Læsio pietatis.—A breach or violation of filial duty. Conditions which involve such a violation are regarded in some cases as *contra bonos mores*, and held not binding. Thus, in

the case of *Fraser*, 18 July 1849, a condition attached by a father to a provision made by him in favour of his child, to the effect that she should cease to reside with her mother, who was of irreproachable character, involving as it did a breach of filial duty, was regarded as *contra bonos mores*, and therefore held *pro non scripto*. A different decision was pronounced in the case of *Reid*, 5 March 1813. In that case a settlement had been made by an uncle upon his nephew, on the condition that he should not reside with his mother, or any of her relations, nor should she reside with him. The legatee objected to this as involving a *læsio pietatis*, contrary to law and morality, and which he could not obey without violating the established order of nature; but the Court declined to exempt him from the performance of the condition. The distinction between the cases seems to be this:—a father is bound to provide for his child, and to that provision he has no power to attach an illegal or immoral condition; but an uncle, being under no legal obligation to provide for a nephew, may attach what conditions he pleases to any provision he may make for him, leaving it as a matter in the option of the legatee to accept or refuse that provision.

Lapsus bonis.—Reduced in worldly circumstances; in straitened circumstances. The phrase applies to a person in pecuniary difficulties, but scarcely amounts to insolvency. It means a person now poor, who had at one time been otherwise.

Lata culpa æquiparatur dolo.—Gross fault is held as equivalent to fraud. This is to be applied only to questions of civil liability; for while fraud, in the usual acceptation of that term, will render the person guilty of it liable to criminal prosecution for fraud, *culpa lata* will not. Thus, if the depositary under a contract of deposit, is guilty of gross fault or carelessness, in consequence of which the deposit is lost, he will be civilly liable to the depositor for its value, in the same manner as if he had fraudulently disposed of the subject. So also trustees, who have, through their gross fault or negligence, allowed the property entrusted to them to be lost or deteriorated, are liable to the beneficiaries in restitution or compensation, just as if they had wilfully defrauded them. Regarding the different degrees of *culpa* recognised in our law, and

the diligence for which certain persons are responsible, see *Culpa.*

Latori præsentium.—To the bearer of these presents. Written obligations and personal bonds, for payment of money or delivery of goods, made payable to the holder without inserting the name of any creditor, were at one time very common. Lord Stair, in treating of such deeds, says: "The conveyance of bonds or other writs, wherein the name of the creditor or acquirer is left blank, have become of late very frequent, and have occasioned many debates as to the conveyance of such rights, and the effects thereof; as first, whether the leaving the name of the creditor or acquirer blank be warrantable, or a fraudulent conveyance, to conceal and keep in the dark to whom the right belongeth, that creditors may not know to affect it by legal diligence: the reason ordinarily given for taking writs in that way is, to shun the trouble of assignations, translations, or intimations thereof, as they pass from hand to hand, according to that tenor of obligation, frequent in other places, whereby the debtor obligeth him to pay and perform such things *latori præsentium;* by which he is obliged to pay to none but to him from whom he may get up the bond, and may safely pay to any that hath it." (B. 3, T. 1, § 5). The frequency with which such deeds were used for fraudulent purposes, gave rise to the Act 1696, cap. 25, which declared that no bond, assignation, disposition, or other deed, subscribed and delivered blank in the creditor's name, should be valid. From the rule of this statute were exempted, the indorsations of bills of exchange, and the notes of any trading company, such as banking companies; and the principle of this exemption has been since extended to cheques, &c. It was questioned recently whether an iron-master's warrant or scrip-note, binding himself to deliver the quantity of iron therein mentioned "to the party lodging this document with me," was of the nature of the obligations struck at by the Act 1696. It was held by the Court of Session to be a document granted *in re mercatoria,* transferable without indorsation, and not falling within the provisions of the statute. *Bovill,* 21 Feb. 1854. *Dimmack,* 1 Feb. 1856. The decision in *Bovill's* case was confirmed on appeal by the House of Lords (29 July 1856), but upon a special ground, the Lord Chancellor (Cranworth) observing,

"If the question had turned exclusively upon the validity or invalidity of this document, I am bound to say that I should not have concurred with the Court of Session. I think that the document is invalid." See also upon this point the case of the *Commercial Bank*, 27 May 1859.

Latu sensu.—In a wide sense; in a more comprehensive sense.

Legatum generis.—A legacy of a certain kind of subject. Where the testator bequeathed to the legatee a subject of a certain kind or class without specifying it so as to distinguish it from other subjects of the same class belonging to him, as, for example, where he bequeathed a horse, a yoke of oxen, a slave, &c., the legacy was called among the Romans *legatum generis*. In some cases of this kind the legatee had the right of choice, but the general rule was that the heir should not be compelled to give the best, nor the legatee to accept the worst subject of the class mentioned. Such a legacy conferred no *jus in re* on the legatee, but merely a personal right to recover, or *jus ad rem*.

Legatum liberationis.—Legacy of a discharge. This is a legacy of that which the legatee may be owing the testator at his death. It frees him from his liability for payment of any sums belonging to the testator which may be in his hands at that time properly as debtor, but gives him no right to retain the testator's money which he may happen to have merely passing through his hands, or with him in temporary deposit.

Legatum nominis.—Legacy of a debt. Such a legacy gives the legatee the full right to the debt so bequeathed, and carries with it the right to enforce payment. This kind of legacy, however, is generally bequeathed to the debtor himself, in which case it operates as a discharge.

Legatum per universitatem.—A universal legacy; so called because under it, the legatee succeeds to the *universitas* or whole moveable estate of the deceased, in so far as it was at his disposal, or to the reversion or residue after satisfying expenses, debts, and other legacies.

Legatum quantitatis.—A legacy of quantity, or, of so much. This is the name given in the civil law to that which we call a general legacy. It is a legacy, not of a special article or debt, but indefinite, of so much money, or other moveables of a particular description; such as a legacy of £100. A special

legacy is one of a particular subject clearly distinguished from the rest of the testator's estate, as, for example, a legacy of a certain watch, or ring, &c. General legacies abate with the inadequacy of the fund out of which they are to be paid; but a special legacy depends only on the existence of the thing bequeathed, and suffers no abatement, if there be enough besides to pay the debts and expenses. A special legacy confers upon the legatee a *jus ad rem specificam*.

Legatum rei alienæ.—Legacy of a subject not belonging to the testator, but belonging to some other person. Where a testator bequeathes a subject not his own, erroneously believing it to be his, it is no legacy; but if he knew it to be the property of another (*res aliena scienter legata*), the legacy must be made good by purchasing and delivering the subject to the legatee, or otherwise satisfying him. If the subject cannot be purchased, the value of it must be paid to the legatee. These rules are borrowed from the civil law.

Legatum universitatis.—A universal legacy, or legacy of the testator's whole estate. See *Legatum per, &c.*

Legitima potestas.—The lawful power. The phrase *liege poustie*, is supposed to be derived from these words. Erskine says: "The term properly opposed to death-bed is *liege poustie*, by which is understood a state of health; and it gets that name, because persons in health have the *legitima potestas*, or lawful power of disposing of their property at pleasure." (B. 3, T. 8, § 95).

Legitima successio.—Legal succession, or, succession according to the rules of law thereanent. An heir-at-law takes up the succession of a ancestor who has died intestate according to these rules, and this is called the *legitima successio*. Bastards may succeed to their father or mother by destination, but they are excluded from their succession by the rule of law. They have no *legitima successio;* and formerly they had not even the power of disposing *mortis causa* of what was their own property. This power was conferred on them by the Act 6 Will. IV. cap. 22.

Legitimo modo.—In legal form; in the manner prescribed by law.

Legitimum tempus restitutionis.—The legal period for restitution; or the time within which, according to the rules

of law, restitution may be claimed. Such, for example, is the *quadriennium*, during which deeds executed in minority may be reduced by the granter on the ground of minority and lesion, and restitution *in integrum* claimed against any act which he may have committed to his own prejudice. The *quadriennium* is an example of a *legitimum tempus* restricted to a certain period; and the right of the owner of a subject which has been stolen, to claim restitution of, and recover that subject whenever and wherever he may find it, may be taken as an example, on the other hand, of a right to insist on restitution which is laid under no restriction in point of time.

Lenocinium.—Pandering to licentiousness; the technical name given in law to the conduct of a husband in pandering to, or conniving at, the infidelity of his wife. It includes any act on the part of the husband, which is likely to result in unfaithfulness on the part of the wife, or which exposes her to pollution. It affords a good defence to an action for divorce at the instance of the husband, and was given effect to in a case where the husband had "caused, prompted, or hounded" the person with whom his wife had committed adultery to attempt to seduce her, although the husband averred that his acts were merely intended to test his wife's chastity. This defence was likewise sustained in a case where the wife averred that her husband had committed such indecencies towards her as invited others to seduce her. *Mackenzie*, 28 Feb. 1745, M. 333.

Leonina societas.—A leonine partnership; *i.e.*, a partnership in which one of the partners bears all the loss, while another receives all the profit. It was so termed by the civil jurists because the partner receiving all the profits was receiving the lion's share. Such an arrangement was not recognised in the civil law as partnership, nor is it recognised in ours. According to our law, to plead that a partnership is *leonina societas*, is to plead that it is illegal and void.

Leviora delicta.—The lighter delicts. These include crimes of the less heinous character, such as breach of the peace, petty larceny, &c., and all those which may be tried summarily; they are called the lighter delicts in opposition to those of a more serious character, the guilt of which must be determined by a jury.

Levis exceptio excusat a spolio.—A slight defence excuses

from the consequences of spuilzie. Spuilzie is the taking away of moveables without either the consent of the owner, or legal warrant. The person so depriving another of his lawful possession is liable not only in restitution of the subject taken, but also in violent profits, although action for the latter prescribes in three years. As spuilzie is not presumed, a slight defence is held sufficient to elide its consequences, such as, that the person taking the subject had reasonable grounds for believing the subject to be his own, or, that his appropriation was unintentional, or that the subject was returned immediately, &c. Spuilzie is the same as theft, except that the criminal intent which is essential to the latter, is not essential to the former. Theft is the *nomen juris* used in criminal proceedings arising out of the act, spulzie when the act is considered *ad civilem effectum*.

Lex Commissoria.—The term applied to a condition which, under the civil law, might be adjected to a contract of sale, whereby the seller was entitled to regard the sale as null if the price of the subject sold was not paid by a certain day. See *Pactum legis, &c.*

Lex contractus.—The rule or law of the contract. Parties to a contract may make any stipulations regarding it or its fulfilment which they may think proper, and the law will enforce them provided they be not illegal or *contra bonos mores*. Thus, although it be the general rule of law, that the lessee of a subject is not liable for its value if it perish by accident, but that such loss shall be borne by the owner or lessor, yet the parties may validly stipulate to the contrary, and the law will enforce such a stipulation, for that is the *lex contractus*. The *lex contractus* includes all provisions or stipulations in a contract, by which the reciprocal rights and obligations of the parties thereto are determined.

Lex domicilii.—The law of the domicile. Personal contracts, or deeds relating to moveable property, are interpreted and enforced according to the law of the place where the contracting parties, or the granter of the deed, had their domicile at the time of contracting or granting, and that without regard to the place where the contract is to be executed, or where the moveables are situated. Thus, a conveyance of moveables situated in Scotland, granted by a domiciled Englishman, will

be construed and given effect to according to the law of England; and so, likewise, a contract entered into between Scotchmen domiciled in Scotland, for the performance of certain works in England, will be enforced according to the law of Scotland. While it is the general rule, that the law of any country will acknowledge and enforce contracts lawfully entered into in some other country, yet the rule admits of exception in cases where the contract is at variance with the morals or general policy of that country in which it is sought to be enforced. Thus, in some countries polygamy is permitted, and the several contracts of marriage entered into by the husband recognised. Such contracts are not recognised in countries where polygamy is forbidden, nor would the rights of any but the first wife be enforced against the husband, since the law acknowledges none other than the first married to be a wife at all. Again, contracts concerning, and deeds conveying, heritable property, must be in accordance with the law of the country where the heritage is situated, because it would be contrary to good policy to admit of the administration of a law different from that held and administered where the property is placed. The *lex domicilii* rules with respect to the person and personal rights, but immoveable and heritable rights are regulated by the *lex rei sitæ*.

Lex feudi.—The rule or law of the feu; that by which the feudal title is determined and regulated. Where two separate titles to the same subject concur in one person, that title which is the chief one, or under which he is bound to hold, is the one by which his right is regulated. "If the seller possess on a fee-simple apparency, and likewise as having right under the entail, the entail, although not feudalised, being the title on which he is by law bound to possess, will be regarded as the *lex feudi*, the regulating title." (Duff, Feud. Con. 180). See a farther illustration of this given under the phrase, *Accessorium sequitur naturam, &c.*

Lex fori.—See *Lex loci, &c.*

Lex loci contractus.—The law of the place where the contract was made. Where contracts are entered into in one country, performance and fulfilment of which are to be made in another, questions frequently arise as to the rules by which those contracts are to be construed and performance enforced.

It is fixed law, that the contract in such a case is to be construed and interpreted by the *lex loci*,—the law of the place where the contract was entered into. Thus, if a contract be entered into, or obligation undertaken, in England, founded upon a *nudum pactum*, where no valuable consideration was given, the courts of Scotland would not give effect to nor enforce such an obligation, because, by the law of England, a *nudum pactum* confers no right, and can sustain no action. In such a case the judgment would proceed upon the rule of the *lex loci*, for, by the law of Scotland, the plea of *nudum pactum* would not be held a good defence in reference to a Scotch contract. Again, in Scotland, no bill or promissory note can bind the obligant therein, unless it be duly stamped; but the law of Scotland does not, on that account, refuse to enforce the obligation contained in an unstamped bill or promissory note, granted in a country by the law of which no stamp is necessary. While, however, the construction of a contract must be determined by the *lex loci contractus*, the mode of procedure for its enforcement must be regulated by the *lex fori*,—the law of the country to whose courts application has been made to compel fulfilment. Accordingly, a Scotch creditor cannot proceed against an English debtor on a bill by summary diligence, as he would against his debtor in Scotland, but must raise action on the bill, according to the forms of procedure in England, either before the Supreme or county courts. "In Scotland this rule has been carried so far, that, although we admit the solemnities required in the execution of foreign contracts, the *proof*, by witnesses, that an English bond was truly executed, though necessary in England, has been held unnecessary when the bond was sued upon here, in respect no such proof is required in the case of a Scotch bond; and, on the same principle, it was decided that a debt contracted in England, though proveable there by parole evidence, could not be so proved when it was sued for in Scotland." (Thomson on Bills, p. 157, and cases there cited.) The *lex loci* thus determines the meaning, intent, and measure of the obligation, the *lex fori* the mode of procedure by which fulfilment of that obligation is to be enforced. This distinction is well brought out in the case of *Don*, 26 May 1837, 2 S. and M'L. 682, in which the House of Lords (reversing the

decision of the Court of Session) held that the bill sued on (which was a foreign bill) was subject to the sexennial prescription of the *lex fori*, and not to the rules of prescription according to the *lex loci*, in respect that prescription affects not the right itself, but the legal remedy for enforcing it.

Lex patriæ.—The law of one's country. This phrase is synonymous with *lex domicilii*, that being regarded as a person's country in which he has fixed his residence. Moveable rights and moveable succession are regulated by the law of domicile, and not by the *lex rei sitæ*,—that is, the law of the place where the subjects in which the rights exist are situated. So, if a domiciled Scotchman die leaving moveable property in England or elsewhere abroad (even if the whole of his moveable property should be so situated), his succession will, nevertheless, be regulated by the law of his domicile. See *Lex domicilii*.

Lex rei sitæ.—The law of the place where the property or subject is situated. Moveable rights, as we have seen above, are regulated and determined by the law of the domicile; but immoveable or real rights are determined by the law of the place where the subject or property is situated. Thus, a contract entered into in England, according to the laws of England, will be enforced in Scotland; or a testament executed in England, conveying moveables situated in Scotland, will be held a valid conveyance, although not according to the forms observed in Scotland in such conveyances. But a deed, affecting or conveying Scotch heritage, wherever executed, must, to be effectual, be framed according to the requirements of the law of Scotland; and therefore a deed executed in England, conveying Scotch heritage, if not so framed, although executed according to the form by which heritage in England is validly conveyed, will be ineffectual in Scotland.

Lex Rhodia de jactu.—The Rhodian law regarding property thrown overboard, for the sake of lightening the ship. The general rule of this law, as stated in the Pandects, is, "that if goods have been thrown overboard for the purpose of lightening the ship, (the loss thus occasioned) shall be made good by the contribution of all, because it was done for the general behoof." (Dig., B. 14, T. 2, l. 1). See *Jactus mercium, &c.*

Lex talionis.—The law of retaliation; by which a person

was made to suffer, as punishment for his offence, the same injury as that which he has inflicted, or attempted to inflict, upon another. It was "a rule of the judicial law of Moses, directing the punishment to be analogous to the crime,—an eye for an eye, and a tooth for a tooth. Thus, if one swore falsely that another was guilty of a capital crime, the swearer was himself punished capitally. This law does not seem ever to have been established in any civilised state. It was at one time attempted to introduce the *lex talionis* into England, in the case of malicious accusations; it being enacted by stat. 37 Ed. III. c. 18, that such as preferred any suggestions to the King's Great Council should put in sureties of taliation. But after one year's trial, this punishment of taliation was rejected, and imprisonment adopted in its stead." Bell's Dict. *h. v.*

Liberatio nominis.—The discharge of a debt. From a very early period the Romans kept *tabulæ* or family ledgers, in which the pater-familias entered his assets and liabilities, his expenses and receipts. As the creditor put down in his *tabulæ* the *name* of his debtor, the word *nomen* came to signify a debt; but the mere insertion of the debtor's name and debt in the creditor's ledger did not prove the obligation. Where the debtor had made an entry in his ledger corresponding to that made by the creditor in his, the two together constituted the obligation; the two entries having the same effect as if the parties had entered into a stipulation. In cases, however, where there was only the creditor's entry, he was allowed to prove the debt in the usual way, and the entry in his ledger was received as an adminicle of evidence. In order to secure the accuracy of this ledger, which was, in fact, a perpetual record of the family estate, a note was taken of the various transactions of the day in a waste-book, called *adversaria*, which was destroyed once in three months. The *adversaria* was of no weight in a court of law, where entries made in the *tabulæ* were alone regarded. Gaius calls debts by the name of *nomina transcripta*, a name arising from the fact of the debts being transcribed from the *adversaria* to the *tabulæ*.

Liberis nascituris.—To children yet to be born. Certain legal rights can, under this destination, be secured to children

yet unborn, and such a destination is almost universally to be found in marriage contracts. Where lands are conveyed to a husband in liferent, for his liferent use allenarly, and to his children *nascituri* in fee, such a destination confers a fee on the father fiduciary for his children, of which he is bound to denude in favour of his children when the time arrives at which they can demand this. In like manner, a conveyance by a father to his children in life at the time *nominatim*, and to those *nascituri*, constitutes an absolute fee in the children named to their own share, and a fiduciary fee in the shares allotted to the children yet to be born. Such conveyances, if properly made and perfected, cannot be affected by the subsequent acts or deeds of the father, but give the children a preference over all their father's posterior deeds, even although onerous.

Libertini.—Freed men. Persons who had been slaves but were freed from slavery were called, among the Romans, *libertini*, in opposition to *ingenui*, persons born free and who had never lost their freedom. The modes in which a slave might be manumitted or enfranchised according to the provisions of the civil law were numerous; it might be done, *ex. gr.* by the master declaring before five of his friends that he bestowed freedom on the slave, or by publicly calling the slave, "son;" or a master might bequeath liberty to his slave in his testament, either expressly, or by implication, as by nominating him his heir.

Liege poustie.—A phrase used in the Scotch law (said to be derived from the Latin *legitima potestas*), to signify that state of health in which a person may legally and effectually dispose *mortis causa* or otherwise, of his heritable property. It is used in contradistinction to the term deathbed,—a *liege poustie* conveyance being one not challengeable by the heir on the ground of deathbed. This condition of health the granter of a deed is held to have enjoyed, if at the time of granting it, he was not affected by the disease of which he died, or if, after executing it, he attended kirk or market unsupported, or survived for sixty days.

Ligia et non ligia.—Liege and non-liege. A liege-fee is that held directly of and under the Crown, while a non-liege, is that held of a subject superior. Erskine, when treating of

the division of feus (or fees) according to the practice of Scotland, says: "Fees are also divided into *ligia* and *non ligia*. In a liege-fee, the vassal owes absolute fidelity to his immediate overlord without exception, which is the case of all fees granted by sovereigns; whereas in those granted by subjects, a reservation is always implied with respect to the highest or liege lord; since no subject can at his pleasure throw off the obedience he owes to his sovereign. The obligations resulting from a liege-fee affect not only the lands granted by the sovereign, but the whole other estate of the vassal; for the person of the vassal is, in that kind of fee, subjected to the liege lord; and of consequence, all his estate, even his moveables *quæ sequuntur personam*. And hence our forfeitures have had their rise; the effect of which, when they fall upon a delinquency against the liege lord, reaches to the offender's moveable estate as well as to his heritable." (B. 2, T. 3, § 12). Crown vassals are designated, in the older writers on Scotch law, *vassalli ligii*.

Lis alibi pendens.—A suit elsewhere depending. It is a good preliminary defence to any action, that there is already depending before a competent court another law suit between the same parties regarding the same subject or dispute. The other action must however be depending before a competent court in Scotland, as it has been decided that another suit pending before an English court does not give rise to this plea, and raises no bar to a similar action being tried in Scotland, if the parties are subject to the jurisdiction of the Scotch courts. The English courts observe the same rule of rejecting the defence of *lis alibi pendens* in Scotch courts. Where an action is depending before the Sheriff or other inferior court, and a similar one is raised before the Court of Session, the plea of *lis alibi* cannot be obviated by advocating the former *ob contingentiam*. *Greig*, 7 Mar. 1835. The effect of this plea is to throw out the action in which it has been successfully maintained.

Lis est sopita. Lis est finita.—Synonymous phrases signifying that the suit is sopited or brought to a conclusion. These phrases mean, not merely that the law suit or action is at an end, but that the subject-matter of it, that is, the question regarding which the parties were at issue, is finally deter-

mined. This is usually said, where the one party has referred the whole matter in dispute to his adversary's oath. Such oath, when explicitly given, is decisive of the cause, and no evidence whatever is admissible to impugn the deposition of the party to whom the reference is made. The clearest evidence of his having committed perjury, cannot affect the decision of the cause, which must be decided according to the import of the oath; and while in such circumstances the person so forsworn may be punished criminally, yet as regards the civil suit, *lis est sopita.*

Lis pendens.—A depending process or suit; an action in the course of being litigated; listiscontestation. This phrase is sometimes used technically to express a preliminary objection to the suit in which it is advanced. For the nature of this plea, and its effects, see *Lis alibi pendens.*

Litem suam facere.—To make the suit his own. By the civil law, a judge was said to make that suit his own, in which, under the influence of corruption, malice, favour, or fear, or even through ignorance of the law, he pronounced an erroneous judgment. He was said to make the suit *sua*, because being responsible for his decision, he took upon himself the risk of the suit. The party injured by the erroneous judgment had an action for indemnity against the judge who pronounced it, the amount of which was determined by the judge before whom such action was tried. In Scotland, no action lies against a judge in respect of any decision pronounced by him contrary to law; but an action is competent if malice or corruption can be proved against him. Actions on either ground are almost unknown in our practice.

Litis ordinatio.—The rule or form under which a suit is instituted and carried out.

Locatio.—The contract of location or hiring. Under this contract one party agrees to give the temporary use of a certain subject, or to perform certain services to the other, in return for which the other party binds himself to make payment of a certain stipulated hire. The person who binds himself to furnish the subject or give the service is called the *locator* or letter; he who binds himself to pay the consideration is called the *conductor* or lessee. These names are those generally applied to the parties to this contract in the

civil law, although in particular forms of the contract the lessees had special names, as *ex. gr.*, the hirer of a house was called *inquilinus*, of a farm, *colonus*. There are three principal kinds of this contract: 1. *Locatio rei;* when one person lets a thing and another hires it, as, for example, when one lets and another hires a horse. The duty of the locator under this form of the contract is to provide and deliver the subject, that of the lessee being to use the subject for the specified purpose agreed upon, and to pay the consideration. If the conductor uses the subject for a purpose other than that agreed upon, he must make good any damage thereby occasioned, but if, in the using of the subject, he adheres to the terms of his contract, he is not liable for any damage, or for the total loss of the subject (unless where this has been occasioned by his fault), according to the rule, *res perit suo domino*. 2. *Locatio operarum;* the form of the contract where one person lets his services and another hires them, whether it be for common labour, as of a domestic servant or a workman, or skilled labour, as of a physician or lawyer. Here, the obligation of the locator is to do the work stipulated, in the manner and at the time agreed upon, while that of the conductor is to pay the consideration. In the hiring of skilled labour, the locator is bound to bestow attention, art, and skill, on the act or services to be performed, and the want of that skill on his part, on which the conductor was entitled to depend, will render him liable for the consequences arising from that want, because *imperitia culpæ enumeratur*. 3. *Locatio operis;* is the name given to that form of the contract of location where one person contracts for the performance of a particular piece of work, and another contracts to do it, as, for example, the building of a house. The contract, for the conveyance of goods, called the *locatio operis vehundarum mercium* (one of the forms of the *locatio operis*), is that under which a carrier contracts for the safe delivery of goods committed to him. His duty is to deliver the goods according to order; and, in the ordinary case, he is liable for their value if lost, under the provisions of the edict *nautæ, caupones*, &c. He is not liable if the loss has been occasioned by what are known as the acts of God, or of the Queen's enemies, except in the special case of the goods perishing through accidental fire, in which case the carrier has been

declared liable for the value of the goods by a recent statute (19 and 20 Vict. cap. 60, § 17). The contract of location gave rise, under the civil law, to the actions *directa* and *contraria*, and, under our law, gives rise to similar actions. See *Actio*.

Locator.—Lessor. The person who, in the contract of location, provides the subject or the services to be given on hire, and receives the consideration therefor.

Loco facti non præstabilis, vel non præstiti, succedit damnum et interesse.—Damages come in the place of an act not performed, or which cannot be performed. The non-performance of a contract subjects the party failing to a claim of damages at the instance of the other party to it, whether the failure arises from a refusal or inability to perform. Thus, if A. and B. enter into a contract whereby A. binds himself to deliver a certain commodity to B., and thereafter refuses to make delivery, he will be liable in damages. Even where A. is unable to procure the commodity contracted for, he is liable in damages, because B. was entitled to rely upon delivery, and to make his arrangements accordingly. A. will also be liable in damages, in the event of his having disabled himself from fulfilling his contract by selling or delivering the commodity to some other purchaser. The different circumstances of each case would determine the amount of the damages to be awarded, but damages to some extent would be due in each.

Loco parentis.—In the place of a parent. Tutors appointed to children by the will or testament of their father, stand *in loco parentis* to the pupils. They have the control of the pupils' persons (although in the general case this faculty is not exercised where their mother, or other near relative is surviving), as well as the administration of their estate. The office of tutor falls on the children attaining minority, when they acquire a *persona standi* which they could not previously have, and are entitled to perform certain acts for themselves, which until then could only be performed by their tutors on their behalf.

Loco rerum immobilium.—In the place or position of immoveable things. This phrase is used by Erskine (B. 3, T. 9, § 4) in reference to the question whether the shares of trading companies, or of the public stocks of any country, are

to be regarded as moveables, and dealt with, in questions of succession, according to the law of the domicile; or as immoveable, and subject to the rules of the *lex rei sitæ*. He says: "A question having been moved, whether debentures granted for money lent to the public in Ireland, and secured to the creditors by an Act of the Irish Parliament, were to be held *loco rerum immobilium* (*i.e.*, as of the character of immoveables)? it was adjudged that they were not, but that they descended as proper moveables *secundum legem domicilii*."

Loco tutoris.—In the place of a tutor. The Court of Session is in the practice of appointing, on application made for such appointment, a factor *loco tutoris* on the estates of pupils not having tutors. Such an appointment places the factor in the same position towards the pupil, both as regards his person and the administration of his estate, as if he held the office by virtue of relationship and was tutor-at-law, or had received the appointment of tutor from the pupil's father under his testamentary settlement, the only difference being that the office of a tutor appointed by the Court is not gratuitous. The duties and obligations pertaining to the office of factor *loco tutoris*, and the forms to be observed in applying for their appointment, were originally laid down in an Act of Sederunt of 13 February 1730, but applications of this kind having become very numerous, and it having "been found that the existing regulations and the present means of enforcing them, are imperfect and insufficient for preventing in many instances the occurrence of great irregularity in the conduct of such factors," an Act was passed for the "better protection of the property of pupils," &c. (12 and 13 Vict. cap. 51), which now regulates the procedure for the appointment of the factor, as well as the duties, the performance of which are incumbent upon every one holding such office.

Locupletari cum damno alterius.—To be enriched through the damage or injury sustained by another. It is an equitable rule of law that no one shall be so enriched, and accordingly any one acquiring gain through damage inflicted on another is liable in restitution. So an heir, (who, in the general case is not bound by nor responsible for the delict of his ancestor,) is liable in restitution to the person injured, if he has been enriched by the act or delict which occasioned the injury.

Penal actions raised against the ancestor, transmit against the heir if he has taken any benefit from the delict on which they are founded. See *In quantum locupletiores, &c.*

Locus contractus.—The place of the contract; *i.e.*, the place where the contract was entered into. See *Lex loci contractus.*

Locus delicti.—The place of the delict, or where the delict was committed. The commission of a delict or crime invests the judge within whose territory it has been committed, with an exclusive jurisdiction *quoad* it, over the person guilty of it. "The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them, or is under any obligation to take notice of, or to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed. Hence it is, that a criminal sentence of attainder in the courts of one sovereign, although it there creates a personal disability to sue, does not carry the same disability with the person into other countries." (Story, Con. of Laws, § 620). It is immaterial in such a case to enquire to what country the offender belongs, or to what jurisdiction in civil matters he is amenable; for criminal jurisdiction arises *ratione delicti.* In all criminal libels or indictments, the *locus delicti* must be clearly set forth, and with as much precision as the circumstances will admit of. The alleged offender is entitled to this, because he may be able to prove that at the time when the offence was committed, he was elsewhere than at the libelled *locus;* and where the *locus* is stated, it is necessary, to warrant a conviction, that the place be proved as set forth in the libel.

Locus pœnitentiæ.—Place or opportunity for repentance, or change of intention. So long as a bargain remains uncompleted by the parties to it, each of them has an opportunity of resiling therefrom, and this opportunity is called the *locus pœnitentiæ.* A great variety of cases might be given in illustration of this. For example, if one party making an offer, which if accepted by the person to whom it is addressed would constitute a completed contract, changes his mind before acceptance, he has the power of resiling from his offer, so

as not to be bound by it. Again, if two persons, having a dispute, agree to enter into a submission of the subject of it to an arbiter chosen by them, either may resile from this agreement before the deed of submission has been executed; or if a landlord agree to give a certain lease of lands to one desirous of becoming his tenant, he may resile from this agreement before the lease has been granted. So long as the bargain or agreement remains incomplete, there remains this power of resiling, for until then the final assent is held not to have been given. The power of resiling may, however, be barred by *rei interventus*, which is the occurrence of some act or circumstance on the faith of the uncompleted bargain being completed. Thus, if the landlord who agreed to give the lease allowed the tenant to enter on possession of the lands in pursuance of the verbal arrangement, he has no longer the *locus pœnitentiæ*, but is bound to complete his bargain by granting the stipulated lease. Homologation, which is an act approbatory of a preceding engagement (and similar in principle to *rei interventus*), also bars the power of resiling. Thus, if, in pursuance of the agreement to submit, the parties have appeared before the arbiter and been heard on their respective claims, neither of them can resile on the ground that the submission has been informal or incomplete, for, by their appearance, they have homologated the informal or incomplete agreement, and are held as having departed from all objection thereto.

Locus rei sitæ.—The place where the subject is situated. See *Lex rei sitæ*.

Luce clarius.—Clearer than light.

Luce meridiana clariores.—Clearer than the light at midday. "In occult crimes, where criminals study the greatest privacy, and which hardly admit of a direct proof by witnesses, as adultery, incest, forgery, presumptions are sustained as evidence, from the necessity of the case. But, because of the severity of the conclusion in criminal trials, the circumstances which constitute the presumptions ought, in the style of the doctors, to be *luce meridiana clariores*, so strong and violent as to carry full conviction to every unprejudiced mind." (Ersk. B. 4, T. 4, § 99). This phrase is most frequently written *luce clarius*.

Lucratus.—Gained; acquired; enriched. This word imports only clear gain, or profit. When, therefore, it is said that an executor, with benefit of inventory, is liable for the deceased's debts in so far as he is *lucratus*, it does not mean that he is liable for debts to the extent of the sum which the estate yielded, but to the extent of that sum, less all the expenses attendant upon its realization. If a person honestly, and for an onerous consideration, purchases an article which has been stolen, and thereafter sells it for a higher price than that paid by him for it, he is liable to the true owner for the amount of the excess in the sum received, over that which he paid,—that being the extent to which he was *lucratus*. See *In quantum lucratus, &c.*

Lucrum cessans, aut damnum emergens.—Gain ceasing, or damage arising. For damage of either kind, the person causing it is liable. An instance of the former may be found in the damage sustained by a wife through the culpable homicide of her husband, for thereby she is deprived of that pecuniary support which her husband afforded, and which, on his death, ceased; while the second may be instanced, by the case of a person severely injured by assault, or otherwise, from which arises the expense attendant upon his recovery, the loss of work, &c.

M

Magister navis.—The master of a ship; whose acts as master bind the owners. See *Exercitor.*

Magistratus majores.—Superior magistrates. "It would seem that by the Roman law, none but the *magistratus majores,* or supreme courts, had a power of reviewing their own definitive judgments. And though by our customs several inferior judges, as sheriff-deputies, commissaries of Edinburgh, and bailies of boroughs, may review interlocutory judgments pronounced by themselves, till decree be extracted in the cause; yet no inferior court has an implied right of reviewing any definitive sentence of its own, so as, without special statutory powers, to suspend or set it aside, after it hath, by the clerk's giving forth an extract, become a decree. From that period the judge's right of cognition ceaseth; whereas our supreme civil court can review, not only the decrees of inferior judges, but their own." (Ersk. B. 1, T. 2, § 6). This power of review must now be understood in a more limited sense than that seemingly indicated by Erskine. All the judges of the Court of Session have not the power of reviewing their own decisions. The Lords Ordinary cannot do so, although their judgments may be reviewed by either Division of the Inner House; nor can the judges of either Division review a judgment pronounced by them, in the case in which it is pronounced. They may review it to the effect of overturning or disregarding it in any subsequent case, but when a definitive judgment has been pronounced in a cause, the supreme, alike with inferior judges, become *functi officio* as regards it.

Majorennitati proximus—Near majority. Minors are

restored by our law *in integrum*, against any deed granted, or obligation undertaken by them to their lesion during minority, and it will not bar their right to this privilege that they were near majority when the deed or obligation was granted. The obligations of a minor are however binding upon him, if at the time of incurring them, he represented himself to be major, and his appearance warranted a belief in his statement, as otherwise he would be taking benefit from his own fraud. The fact of a minor's being near majority, is chiefly of importance in redarguing the presumption of law, that the person who contracted with him was taking advantage of his youth and inexperience. See the case of *Wilkie*, 28th Feb. 1834, 12 S. 506, where the minor was near majority, but the privilege of his minority was denied him; and the case of *Dennistoun*, 31 Jan. 1850, 12 D. 613, where the privilege was given effect to.

Majori minus inest.—The greater includes the less. A conveyance of the principal subject carries with it all its accessories to the grantee, although not expressly enumerated. Thus, a disposition of heritable property is held to convey not merely the property, but also the lesser rights attached to it, such as servitudes; and an assignation, in like manner, to a personal debt, carries the interest due upon it, as well as all action competent for its recovery.

Mala grammatica non vitiat chartam.—Grammatical error does not vitiate a writing or deed. If the meaning be clear and intelligible, and the substantial facts expressed, no account is taken of grammatical inaccuracies. *Mackintosh*, 17 Nov. 1825, 4 S. 190, and *M'Ghie*, 5 June 1827, 5 S. 758. In the latter case the word "*dici*" in the notary's docquet to a sasine, was spelt "*disi*," but the objection stated on this among other grounds, was repelled.

Malitia supplet ætatem.—Malice supplies the place of age. A child still in pupillarity committing a crime is not amenable to the ordinary punishment inflicted upon adults for its commission, because the law presumes that the child acts in ignorance, and that there is thus wanting the criminal intention which forms the essence of every crime. If, however, this intention can be proved, that supplies the defect in age, and takes away the legal presumption in the pupil's favour. This

presumption in favour of the pupil has place *a fortiori* in crimes chiefly arising from statute, and where consequently the criminal character of the act is not so obvious.

Malitiis hominum non est indulgendum.—Indulgence is not to be shown to the malicious desires of men. This may be best explained by quoting a passage from Erskine, in which the phrase occurs: "As all servitudes are restraints upon property, they are *stricti juris*, and so not to be inferred by implication. Neither does the law give them countenance, unless they have some tendency to promote the advantage of the dominant tenement. No man, therefore, who has not acquired an interest in his neighbour's grounds, by an antecedent right of pasturage, can, by any stipulation, restrain him from pasturing on his own property as many cattle as he shall think fit to set upon it; for *malitiis hominum non est indulgendum.* Upon this ground the Roman law required, towards the constitution of a servitude, vicinity in the dominant and servient tenements." (B. 2, T. 9, § 33). Upon the same ground our law will prohibit any proprietor putting his property to any use which is not for his own advantage, but is merely *in æmulationem vicini.*

Malum in se.—Bad (or, wrong) in itself. This name is given to any wrongful act, the culpability of which arises from its being contrary to the law of nature, or the rules of morality, and which may form the subject of indictment. Formerly all serious offences against morality were punished criminally, as, for example, blasphemy and adultery, but now offences against morality merely which do not violate the declared and recognised laws of the land, are not made the subject of criminal prosecution. The acts falling under this general designation, as the name implies, must be wrong in themselves, such as murder, theft, perjury, &c., and not merely rendered illegal by statutory enactment.

Malum prohibitum.—A wrongful and prohibited act. Such acts are distinguished from the *mala in se*, in this respect, that they being opposed to morality and law, are wrong in themselves, while *mala prohibita* are not criminal in themselves, but become illegal by virtue of their prohibition. Thus, salmon fishing cannot be regarded at any time as in itself an illegal act, but by virtue of statutory enactment it is rendered

so during a specific period of the year; and by the Public House Act (1853) certain practices were declared illegal which had not previously been considered so, but were, on the contrary, universal in their adoption by the persons in that particular trade.

Manifestum.—Manifest, evident. See *Furtum.*

Manu aliena.—By the hand of another. Formerly, when sasines were necessary to complete a feudal right, those given *propriis manibus* required no antecedent precept, while those given *manu aliena*, that is, by the hands of another than the person from whom the right proceeded, required such an authority to warrant the sasine, and to make it effectual. The words of this phrase are also frequently to be found in the long docquet which the notary required at one time to append to the instrument of sasine. It was customary for him there to state, although not essential to the validity of the deed, that the instrument had been written *manu mea* by his own hand, or *manu aliena* by the hand of some other person. The long docquet was abolished along with the old form of instrument by the Infeftment Act (1845), and the instrument of sasine was abolished altogether by the Titles to Land Act (1858).

Manu militari.—By military aid. "By our present practice, since the union of the two kingdoms, in 1707, where one opposes by violence the execution of a decree, or any lawful diligence, which the civil magistrate is not able by himself and his officers to make good, application is made to the military for assistance, who enforce the execution *manu militari.*" (Ersk., B. 4, T. 3, § 17). Such aid is never called for now in the enforcement of civil diligence, and very rarely in the enforcement of the judgment of a justiciary tribunal.

Maritagium.—The casualty of marriage. Under the feudal system the superior was entitled to this casualty on the marriage of the heir who succeeded to the estate. If the heir was a female, the superior was entitled to select for her a husband, and she could not refuse the person so selected without forfeiting her estate, or at least as much as the match was estimated to be worth. In the case of a male heir, the superior was also entitled to this casualty, which varied in value in different cases, but was generally equal to the tocher which the heir received. The casualty was excluded if the heir mar-

ried during the lifetime of the ancestor, because during his life the heir was not the superior's ward, and the superior had, consequently, no right to dispose of the heir in marriage. This casualty of superiority was abolished by the statute 20 Geo. II., cap. 50.

Materna maternis.—The goods acquired through the mother descend to those connected with her. "In the Roman law, where a person died leaving half-brothers, both consanguinean and uterine, a distinction was taken as to his succession, between what he had derived from his father, and what he had derived from his mother. The former went to his brothers-consanguinean, the latter to his brothers-uterine, on the maxim *paterna paternis, materna maternis.* And, generally, the principle of the maxim applied to any competition between relations on the father's and mother's side. This rule has no place in the law of Scotland, where the half-blood uterine, and in general, all the relations by the mother's side are excluded from succeeding." Bell's Dict., *h. v.*

Matrimonia debent esse libera.—Marriages ought to be free. Full and free consent is essential to the contract of marriage, and force or fraud will have the same effect in nullifying it, as they would have in the case of any other contract. The force, founded upon for that purpose, must, however, have been such as the person pleading it could not have withstood. The mere force of parental influence, or threat of parental displeasure, disinheritance, &c., are not sufficient.

Matrimonium ipsum.—Marriage itself. Present consent alone is essential by the law of Scotland to constitute marriage; but the consent, to have this effect, must not refer to a ceremony to be celebrated at a future date. Thus, in a marriage contract, where the parties consent to take each other as lawful spouses, and bind themselves to solemnise the marriage, the consent does not constitute marriage, but merely an obligation to marry, from which either party may resile. The consent must be given with the view of constituting marriage at the time when it is given. "Nor will a written declaration of marriage, found in one's repositaries after death, or so framed as to be effectual only after death, be a legal constitution of marriage." Bell's Prin., § 1514.

Media concludendi.—The grounds of action; those allega-

tions or grounds on which the pursuer of an action seeks to have decree pronounced in terms of the conclusions of his summons. When the allegations so made are insufficient, or are such that, being admitted or proved, the conclusions libelled would not follow according to law, the summons is said, technically, to be irrelevant.

Media sententia.—A middle view or opinion. This phrase is quoted by Bell (Prin., § 1298) from the Institutes of Justinian, who settled the controversy regarding specification which took place between the rival factions of jurists, the Sabinians and Proculeians, by adopting the *media sententia.* To state very briefly the nature of this controversy, and the view taken by the Roman Emperor, and now adopted by our law, will be the most satisfactory manner in which to explain and illustrate the present phrase. The Proculeians held that specification, by changing the form of the raw material, changed its nature, and replaced it by something quite new, and that, therefore, the maker of the new article was the owner of it, and not the person to whom belonged the material of which it was made. The Sabinians, on the other hand, were of opinion that the material retained its original nature, and continued to subsist, notwithstanding its change of form, and that, accordingly, the new article belonged to the proprietor of the material. Neither of these extreme views were adopted by Justinian, who followed a middle opinion, based upon the distinction set forth in the Institutes, B. 2, T. 1, § 25; and this middle opinion has also been followed in our law. (Bell, *supra*). It may just be noted, with regard to the two great schools of Roman jurists above mentioned, that they took their names from that of their leaders, both of whom flourished in the time of Augustus; the distinguishing feature between them being, that the Proculeians, the disciples of Proculus, endeavoured to enlarge the principles of the Roman law, and did not hesitate to make such innovations as they conceived a more liberal philosophy and reason to require; while the Sabinians, the disciples of Sabinus, adhered with scrupulous fidelity to the legal doctrines as they had been handed down to them.

Medio tempore.—In the meantime. (Stair, B. 1, T. 6, § 45, and B. 3, T. 1, § 45).

Meditatio fugæ.—The intention of absconding. See *In meditatione fugæ.*

Medium impedimentum.—A mid-impediment; which is defined to be "anything which intervenes between two events, and prevents, *quoad* the former event, the retrospective operation of the latter." (Bell's Dict. *h. v.*) To illustrate this, and its operation, take the following case: A. dispones to B. certain lands to be holden *a me* on which B. is duly infeft; thereafter A. dispones the same lands to C. with a similar holding, who is duly infeft and obtains confirmation from the superior. The lands in such a case are vested in C. to the exclusion of B., although B.'s sasine was first on record, because B.'s right is imperfect and cannot come into competition with the right of C., until confirmed, and confirmation is rendered impossible or ineffectual by the mid-impediment occasioned by the confirmation in favour of C. But for that mid-impediment B. might at any time have rendered his right complete and indefeasible by confirmation. The result, however, would be different if the holding in B.'s right was alternative (*a me vel de me*), for in that case his sasine on the *de me* precept would vest him indefeasibly with the property, while C.'s prior confirmation would only create in his favour a mid-superiority which could be elided at any time by B.'s entering with the over-superior. On this nice point in conveyancing, reference may be made to Menzies' Lectures, 605, and Duff's Feud. Con. 221-3.

Melior est conditio possidentis vel defendentis.—The condition of a possessor, or of a defender is better. The condition of a possessor of a subject, concerning the right to which there is a dispute, is better than that of the person challenging the right of possession and claiming the subject. The advantage of the possessor consists in this, that he requires to shew no title, while the challenger must do so, and even then the possessor is preferred to the subject unless the challenger can shew a better title than that on which the possessor holds. The condition of a defender is better than that of a pursuer. because the whole *onus* of proving his case lies on the pursuer, See *In re communi, &c.*

Mendicatorie.—Supplicatingly. Stair, B. 1, T. 12, § 2.

Merx et pretium.—Goods, and a price. These two things are necessary to every valid contract of sale, namely, the commodity to be sold, and the determinate money price to be

paid therefor. It is not a sale, but barter, where any thing other than money is given in exchange for the commodity.

Messis sementem sequitur.—The crop belongs to the sower. This maxim is applied to cases of *bona fide* possession, and on the principle of it, it is held that a person who sows a crop on lands of which he is in possession, and of which he has reason to believe himself the proprietor, is entitled to reap that crop although it is discovered in the meantime that another person has a preferable title to the land, and he (the sower) has been dispossessed. The executor of a deceased person is entitled also on the principle of this maxim to reap the crop which the deceased sowed.

Metus causa.—Through fear. If the consent of a party to a deed or contract has been extorted through fear, he may reduce either on that ground. But the fear must be a just fear, and such as, in the circumstances, the person could not withstand. See *Ex capite metus.*

Miles.—A soldier; but this name was also given anciently to all vassals, who held lands, under the obligation of rendering military service to their superior therefor. Ersk. B. 2, T. 4, § 2.

Minor non tenetur placitare super hereditate paterna.—A minor is not bound to defend at law his right to his ancestor's heritage; when that right is challenged by one who claims the heritage on a title preferable to that which existed in the minor's ancestor. During minority the minor is not even bound to declare whether he will take up the succession, but is allowed six months after he has attained majority to deliberate whether he will do so or not. "This privilege is limited to proper feudal heritage, and does not extend to leases, however long the period of endurance. Nor does it apply to the settling of marches, nor to the division of land, nor to a possessory action, nor to an action at the instance of the superior for feu-duties or casualties, nor where the action has been commenced in the lifetime of the ancestor. In order to entitle the minor to state this plea, he must be served heir and infeft; and his infeftment, when produced, supersedes all further production till he be of age. It is the heir of investiture alone who can plead the privilege; and it cannot be pleaded to support the fraud of the ancestor, nor to oppose the

effect of the ancestor's obligation, nor in opposition to a minor suing for reduction on the head of minority and lesion." (Bell's Dict., *v. Minor.*) *Placitare* signifies to be a party to a suit, from *placitum* a vocable of the middle ages for suit or process. Ersk., B. 1, T. 7, § 43.

Minor tenetur in quantum locupletior factus.—A minor is bound to the extent to which he has been enriched or benefited. A minor on attaining majority has the privilege of reducing any deed granted, or obligation undertaken, and of repudiating any transaction entered into with or for him, if the same has been to his lesion. But if he has been benefited thereby, his privilege is excluded, for it would be obviously unjust to allow him to reap the advantage, and thereafter repudiate the transaction which conferred it. This would be directly opposed to the maxim, *Nemo debet ex alieno damno lucrari.* The measure, therefore, of the minor's benefit or lesion is the measure of his privilege. If he has been altogether benefited by the transaction, his privilege is altogether excluded, but if he has suffered lesion, he can plead his privilege to the effect of being restored against that which caused it, and to the extent of the injury inflicted.

Mitiores pœnæ nobis semper placuere.—Literally, lighter punishments are always more pleasing to us; *i. e.*, it is more pleasing to inflict a light than a severe punishment. Stair, B. 2, T. 11, § 31.

Mobilia sequuntur personam.—Moveables follow the person. By a legal fiction, moveables are always regarded as situated in that place where their owner has his domicile. Thus, if a Scotchman having moveable property situated in Scotland, be domiciled in England at the time of his death, the succession thereto will be regulated by the law of England; and on the same principle a deed of transference of moveables executed according to the law of the domicile will be held effectual to convey moveables situated in a country where such a mode of conveyance would not be effectual. The payment of succession duty on personalty is also settled upon the principle of this phrase; for if the deceased be domiciled within the kingdom at the time of his death, the duty is exigible without regard to the place where the personalty is situated, but if he be domiciled outwith the kingdom no

duty is exigible, although the whole of his moveable estate should be situated within it. Tilsley on Stamp Laws, 680.

Moderamen inculpatæ tutelæ.—The limits of inculpable defence. This phrase signifies that degree of self-defence which any one may legally use, although it should occasion the death of the aggressor, without subjecting himself to the charge of murder or homicide on that account. The rules of our law regarding inculpable homicide will be found in Hume, I. chap. 6.

Modica differentia.—A slight or moderate difference. Stair (B. 3, T. 8, § 62), in treating of the office and duty of an executor, and of the value put by him upon the effects of the deceased which he is required to give up by inventory to the commissary, says: "It may be questioned here, whether these things can be called *male appretiata*, which are appreciated by the defunct himself? Doubtless *modica differentia* is not to be regarded; but if the price be considerably to the lesion of creditors, legators, or others, as being a half or third within the just price, they may be repreciated."

Modus habilis.—A habile or competent mode. See *Habili modo.*

Modus transferendi dominii.—The form of transference of property. Lawyers distinguish between the *titulus* and the *modus transferendi*, the former being the will or intention to convey, and the latter being the overt act by which that intention is expressed and the real right transferred. See *Causa et modus.*

Modus vacandi.—The manner in, or the act by which the property became unoccupied or ownerless. This phrase scarcely admits of literal translation, but its meaning will be clearly understood from the following quotation where it occurs. In treating of the *quæquidem* clause in the charter of resignation, Mr. Menzies says: "Its office here is to express the *modus vacandi, i.e.*, to shew how it is, and for what purpose, that the fee, having been formerly given out by the superior, is again in his hands. It bears, therefore, that the lands formerly pertained heritably, (*i.e.*, by a completed infeftment,) to the former vassal, (granter of the disposition,) holden by him of the granter of the charter as immediate lawful superior thereof, and were resigned by him, by virtue

of the procuratory of resignation contained in a disposition, (which is identified by its dates,) granted by him to the disponee, in the hands of the granter of the charter as superior in favour and for new infeftment of the same to be granted to the disponee." Menzies' Lectures, 599.

Molituræ—Multures; which were the portions of grain given to the miller in return for his grinding the rest. Where lands were thirled to a certain mill the miller was entitled to the multures out of the astricted grain although it was not brought for grinding to his mill, and this alike where the thirl had carried his grain to another mill, or had sold it unmanufactured. For the history and description of the different kinds of multures, see Ersk., B. 2, T. 9, § 18, *et seq.*

Mora—Delay. This word signifies technically undue or culpable delay, and subjects the person against whom it can be charged, to the consequences which arise from it. A debtor is said to be *in mora* if he does not pay his debt when it is due, and is thereafter, consequently, liable to the creditor in interest, which is held at common law to be the loss which the creditor suffers by the delay. Should the creditor suffer real loss by the debtor's delay, he will be entitled to decree against the debtor therefor. *Mansfield*, 27th July 1836, 14 S. 585. On the same principle, a borrower in commodate, or a lessee in hiring, although in the general case not liable for damage to the subject lent or hired, will be liable for such damage if he has been guilty of *mora* in the re-delivery of the subject, after the purpose for which it had been obtained is fulfilled, and that even where the damage has arisen from accident. Again, *mora* on the part of a creditor in beginning or completing diligence against his debtor's estate or person, will free cautioners from their obligation to him.

Morandæ solutionis causa—For the purpose of delaying, or postponing payment. In construing a will, the question frequently arises whether legacies there bequeathed vest on the death of the testator, or do not vest until the day specified as the date of payment. In the case of *Burnets*, 9th Dec. 1783, (M. 8105,) the question arose whether a legacy left "to be paid when he (the legatee) is sixteen years of age" vested *a morte testatoris;* the legatee having predeceased the term specified. It was held that it did so vest, the court

being of opinion that the bequest itself was absolute, and the time specified only *morandæ solutionis causa*. But see the case of *Omey*, 19th Nov. 1798, (M. 6340,) the decision in which seems to be opposed to the one just stated. The later decisions on this point appear to be somewhat conflicting, but the tendency now is to hold the legacy as vested, and that uncertainty in the time attaches to the date of payment merely, unless the terms of the deed be such as clearly to indicate a different intention on the part of the testator. On this point, see the cases quoted in Menzies' Lectures, 478.

Morbus sonticus.—A serious sickness or malady; defined by Stair as a mortal sickness. It was at one time necessary to prove a *morbus sonticus* in reducing a deed on the head of death-bed, but this is not now necessary. If the testator is affected by the disease, of which he died, when he executed the deed, and does not survive the execution of it sixty days, or attend kirk or market, this is a sufficient ground for reduction, although the disease is not of the class generally known as mortal. This phrase is now applied to incapacitating diseases. *Laird*, M. 3315.

More burgi.—According to the custom in burgage-holdings. Burgage-holding is the tenure by which lands situated in a royal burgh are held of and under the Crown. The titles (and the manner especially in which an heir's title was completed) to burgage subjects were at one time different from the ordinary title to lands held feu, but they have been assimilated by the recent statutes affecting land rights. They continue still, however, to be recorded in the particular register applicable to such rights.

Morte donantis donatio confirmatur.—A donation is confirmed or established by the death of the donor. Ordinary donations being absolute and irrevocable, need no confirmation; but this phrase applies to the case of a donation between husband and wife, which are revocable at any time. The donor may revoke the donation during lifetime, or by *mortis causa* deed, but failing revocation by himself or herself, the death of the donor confirms the donation, so that it cannot be revoked or called in question by the donor's heirs. See *Donatio inter virum, &c.*

Morte mandatoris periit mandatum.—A mandate falls on

the death of the mandant. As the mandatory's authority originated in the mandate, so that authority is at an end when the source from which it proceeded has ceased to exist. Yet, if the mandatory be ignorant of the mandant's death, and proceed thereafter to the performance of certain acts in terms of the mandate, such acts will bind the mandant's heir. On the principle of this maxim, precepts of sasine, being mandates by the granter authorising the infeftment of his disponee, were at one time ineffectual to warrant sasine after his, the granter's, death. To remedy the inconvenience hence arising, it was enacted (1693, cap. 5), "that procuratories of resignation and precepts of sasine, either already granted, or to be granted, shall, in all time coming, continue in full force, and be sufficient warrands, not only for making of resignations and taking seasins in favours of the parties to whom they are or shall be granted, but likewise in favours of their heirs, assignees, and successors, having right to the said procuratories and precepts, either by a general service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters, or parties to whom they are granted, or both."

Mortis causa.—Deeds made in contemplation of death are so called, because the prospect of death is the cause which induces their execution. Wills disposing of moveables, and dispositions of heritage, to take effect only after the granter's death, are called *mortis causa* deeds, in opposition to deeds taking effect during the life of the parties, which are termed *inter vivos*. As *mortis causa* deeds are of no avail until the death of the granter, they may be recalled or altered by him at any time during his life, and that even where they contain a renunciation of his right to revoke.

Mortuus sasit vivum.—The dead ancestor invests the living heir. A maxim of the English law, which signifies that the moment a man dies his real estate vests in his heir-at-law, whoever that may be. This maxim has no application in our law, for until the heir completes his title to his ancestor's estate in habile form, it is said to be *in hæreditate jacente* of the deceased. The law of Scotland rejects the principle of an *ipso jure* investiture by mere survivance. Until the heir has made up his title, it does not hold him responsible for his ancestor's obligations, nor does it allow the heir's acts or deeds

to affect the estate. "But as the possession and ostensible right of an apparent heir, when long continued, raises to him a credit as proprietor, it has, on equitable considerations, been enacted that, if such possession as apparent heir have been continued for three years, his debts and onerous deeds shall, to the value of the estate, form a debt against the next heir, who shall pass him over, and make up titles to a previous ancestor." Bell's Prin., § 1690.

Multa impediunt matrimonium contrahendum, quæ non dirimunt contractum.—Many things hinder the contraction of a marriage, which do not detract from its validity when contracted. There are not many cases illustrative of this maxim to be found in the law of Scotland, but the following may be taken as an example. If, at the time of entering into the marriage either of the parties be insane, such marriage would be null. Insanity before marriage,—that is, at the time when the contract is entered into,—effectually hinders or impedes its contraction, because insanity prevents the party so affected giving that consent which is essential to marriage. But the fact of one of the parties becoming insane after marriage will not affect its validity if otherwise valid.

Munera publica.—Public offices. Among the Romans there were certain offices regarded as public duties, which no citizen (unless he could plead certain specified excuses) could refuse to accept of and fulfil; and among these were included the offices of tutor and curator. These offices are voluntary by the law of Scotland, and their acceptance, as well as the performances of the attendant duties, cannot be imposed upon any one against his own wish. But if the office has been once accepted and entered upon, the tutor or curator cannot resign it. He must perform the duties of his office until it expires through the death, attainment of minority or majority, as the case may be, or it may be through the marriage of the ward, and he will be liable for the consequences of his neglect, as well as the consequences of his actings and intromissions. The office of High Sheriff of a county in England is somewhat similar to the *munus publicum*, for no one elected to that office can decline to accept it, except under a very heavy pecuniary penalty. It is in the option, however, of the Sheriff elect, either to take the office or to pay the fine.

Municipia.—Free towns. These were towns or cities (particularly in Italy) dependent upon Rome, the citizens of which possessed the right, and certain of the privileges, of Roman citizenship. They were governed by their own laws, called *leges municipales*, and hence the term municipal law came to signify the law of any free state.

Mutua petitio.—A counter claim; or a claim set up by a defender in answer to one made against him by a pursuer. Ersk., B. 4, T. 2, § 11.

Mutuum.—A species of loan. The loan of mutuum is that contract under which the borrower receives certain articles which perish in the use, as wine, corn, &c. (known technically as fungibles), in return for which he binds himself to give the lender an equal quantity of a subject similar to that borrowed. It differs from loan in commodate, in respect that under that contract the borrower is bound not to deliver the equivalent, but the *ipsum corpus* of the thing borrowed. There is this farther difference, that in commodate any deterioration of the subject lent, or its total loss, if not occasioned by the fault of the borrower, must be borne by the lender; whereas, in mutuum, all the risk lies with the borrower. Both of these contracts of loan are necessarily gratuitous, for if anything was given or paid in return it would become location.

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Nam scire debet cum quo contrahit.—For one ought to know with whom he contracts. Some obligations are neither binding nor prestable, because of the position of the person granting them, and this phrase expresses the rule of law on which action is refused even to a *bona fide* holder of such an obligation. Thus, in the case of a debt incurred by a married woman for goods furnished to her without the consent of her husband and not necessary to her, no action will lie against her husband for the amount, because the seller should have known the position of the person with whom he contracted, and that, being a married woman, she could not validly enter into the transaction. So, in dealing with a minor, it will be no defence to an action for reduction of the contract at his instance, that the fact of minority was not disclosed and was not known, for the contracting parties should know who and in what position the parties are with whom they contract; but the case might be different if the minor gave himself out to be of full age, and the person with whom he contracted had no reason for doubting the assertion. Thus, also, any one who had honestly purchased, and for a fair price, a stolen subject, cannot resist restitution thereof on the ground that he was ignorant of the theft, for he was bound to know with whom he was dealing and to have satisfied himself of the seller's right, and in not doing so he takes all the risk and hazard upon himself.

Nasciturus.—Yet to be born. Lands are frequently disponed by marriage contracts to the children *nascituri*, and if properly fenced, such destination carries the fee to the children,

leaving it meanwhile as a fiduciary fee in the person of their father for their behoof. Another common form of destination is to children *nominatim*, and to others *nascituri*, which vests the fee in the children named, for their own share, and with a fee in trust for those not yet born.

Natis et nascituris.—To children born and to be born. A form of destination frequently used in conveying heritage to children of a marriage.

Nativi.—Bond-men or slaves, by whom anciently, in Scotland, the lands were laboured. They resembled in some respects the *adscriptitii* of the Romans; but they could not be sold by their master. They acquired an immunity from their servitude, by residing for a year together in any royal burgh without challenge on the part of their master.

Naturalia feudi.—Those things which naturally belong to a feu grant. Such, for example, are the obligations on the part of the granter of the feu to warrant it against eviction to the grantee; the obligation on the part of the grantee to pay the feu-duty. "By the *naturalia feudi* is understood whatever arises from the nature of the contract; and so is deemed part of it, though it should not be expressly provided for. In this they differ from the essentials of a feu, that they may receive an alteration from the will of the parties, without destroying the feudal contract; but such will must be properly expressed in the grant or contract itself." (Ersk. B. 2, T. 3, § 11). Among the *naturalia* of a burgage grant, were the watching and warding in return for which the lands were held.

Nautæ, caupones, stabularii.—Literally, carriers by sea, innkeepers, stablers. These are the first words of an edict issued by a Roman praetor, which is well known as the edict *nautæ, caupones, &c.* By it, such persons as those described were rendered liable for the goods and effects of travellers lodging at their inns or for goods entrusted to them for carriage and delivery, where the goods were lost or damaged. To render them liable, it was not necessary to prove fault or negligence on their part, as this was presumed. This stringent rule was enacted because such persons by their position had unusual facilities for committing theft, or inflicting injury on the effects committed to their care, without incurring the same

risk of detection. To maintain that the goods were stolen from them was no valid defence, for otherwise it would have been an easy matter for them to arrange with dishonest men a plan by which they should share in the booty, without subjecting themselves in any civil liability. This rule has been adopted by the laws of England and Scotland as well as by most of the nations of modern Europe. With us its provisions apply to all common carriers whether by sea or land, innkeepers, stablers, &c. "The rule is, that common carriers, innkeepers, and stablers, are responsible for the loss of things committed to their charge, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God, or of the King's enemies." (Bell's Prin. § 235). But this rule has been rendered, in one particular, still more stringent by the Act 19 and 20 Vict. cap. 60, which provides that carriers shall be liable to the owners for the value of goods which perish through accidental fire. There are a variety of circumstances in which the responsibility thus imposed is removed from the innkeeper &c. altogether, or limited in its extent, for which reference may be made to Bell's Prin. § 236, *et seq.*, and the authorities there quoted.

Ne conjuges mutuo amore se invicem spolient.—Lest spouses through their mutual love should impoverish one another. This is the ground stated in the civil law, as that on which donations between husband and wife were held as invalid or ineffectual. (Dig. L. 24, T. 1, l. 1). The rule prohibiting inter-conjugal donations was said to be introduced for the purpose of preserving the marriage relation in its purity, as an agreement subsisting by affection, and not maintained, (for the husband could dissolve the marriage by simply giving the wife a letter of divorcement and leaving her), by purchase or by gift from one party to another. At a later period in the history of the civil law (under Septimius Severus), the strictness of this rule was relaxed, and donations between husband and wife were held valid if not revoked by the donor before his death. This is now the law of Scotland. See *Morte donantis, &c.*

Ne dominia rerum sint incerta, neve lites sint perpetuæ.—Lest the ownership of things should remain doubtful, and lest law suits should never have an end, or limit. The rules

of prescription are founded upon the principle of this phrase, for it has been deemed impolitic to allow a right of property to be disputed after a certain time, or to allow actions to be raised at a period when the parties to the transaction out of which it arises may all be dead, and the circumstances of the transaction entirely forgotten, or most imperfectly remembered. Accordingly, by our law, undisputed possession of a subject for forty years does not only merely raise a presumption of right, but confers a right of property. A right of action must be exercised within the same period (some actions within a much shorter, as, for example, an action arising out of tutorial accounts which prescribes in ten years), otherwise the action will be excluded. The distinction between a proper prescription, and that which (although generally so called) is merely a limitation, must be borne in mind. Prescription extinguishes the claim and action arising therefrom, while a limitation merely limits the mode in which the claim may be substantiated, or the legal remedy enforced. Thus, the forty years prescription, *ipso jure*, extinguishes the debt and bars action for it, and this defence is sufficient of itself to throw the action out of court. On the other hand, the triennial prescription (commonly so called, but more correctly a limitation) merely confines the pursuer to the necessity of proving the debt claimed by the debtor's writ or oath. The sexennial prescription of bills is a proper prescription, because it excludes action on the bill, although the creditor may sue at common law for the amount it contains. The bill is prescribed, but not the debt; the practical difference being, that the debtor may state defences against the debt at common law, which would not be tenable in an action within the six years founded on the bill, nor sufficient as reasons in a suspension of summary diligence.

Ne mutuato amore invicem spoliarentur.—Lest they should be impoverished by each other through their mutual affection. See *Ne conjuges, &c.*

Ne urbs ruinis deformetur.—Lest the city should be disfigured by ruinous houses. All questions relative to the building, repairing, or taking down of houses, fall properly within the jurisdiction of the Dean of Guild, and such alterations or new erections can only proceed on his warrant. He has power to order the repair or demolition of ruinous build-

ings; and payment of the expense incurred by repairs made upon his order is secured by a tacit hypothec over the building on which such repairs are made. This power, however, only extends over buildings the insufficiency of which threatens the safety of the lieges. If the building be sufficient and safe, it need scarcely be added, the Dean of Guild has no power to order alteration or repairs, simply because it disfigures the city. He may refuse his warrant for the erection of a house where the proposed plan is not in accordance with the prescribed form and character of building on that particular plot of ground, but this proceeds upon the fact that the builder proposes to violate certain restrictions by which he is bound, and not because his building would disfigure the adjoining range of buildings.

Nec cum sacco adire debet.—He (a debtor) is not bound to go about with a money-bag. This phrase means, that a debtor cannot be expected to carry with him as much money as will meet his obligations, and that therefore a reasonable time for paying his debt must be allowed him after requisition has been made; and so Stair, in treating of the time of performing obligations, uses this phrase (quoting from the Pandects, L. 46, T. 3, l. 105), where he says, "if money be required, if the debtor offer within twenty-four hours, it would not infer delay; for it is not his part to carry a sum of money about with him, nor to have it ready at each instant, *et nec cum sacco adire debet.*" B. 1, T. 17, § 18.

Nec manifestum.—Not manifest. Theft was so called in the civil law when the thief was not caught in the act, or before he had reached the place whither he was conveying the stolen property. See *Furtum.*

Necessitate juris.—By necessity of law; arising necessarily from the nature or effect of legal rules. In illustration of this, reference may be made to Erskine, where, in treating of what is carried by an adjudication directed against the *hæreditas jacens* of a deceased debtor, and of its effects as regards rents which have become due after the debtor's death, but before the decree of adjudication is pronounced, as opposed to the effect of an ordinary adjudication, which carries no rents due previous to the date of the decree, he says: "But rents incurred after his death cannot be said to have belonged to him, since

they did not even exist at his death, and are truly a rent grown out of his heritable estate since his death, which, for that reason, would have accrued to his heir if he had entered. As, therefore, by the heir's renunciation of the debtor's succession, the adjudger comes in the heir's place, these rents must, *necessitate juris*, be carried by the creditor's adjudication against the *hæreditas jacens*, though fallen due previously to the date of it, there being no other method known in law by which they may be affected by diligence." B. 2, T. 12, § 48.

Necessitate precepti sed non necessitate medii.—This phrase (occurring in Stair, B. 1, T. 4, § 6) scarcely admits of literal translation. It means, that the consent spoken of by Stair is necessary as an act of obedience to the law, but not necessary as an essential to the validity of the contract; that minor children should obtain the previous consent of their parents to their marriage, but that the want of such consent will not invalidate the contract after it has been entered into. With us the consent of parents is in no way necessary to the validity of a marriage entered into between minors; in England a different rule prevails, for the parents' consent is essential to the marriage of persons still in minority.

Negotiorum gestor.—The name given to any one who manages the affairs, or acts for the behoof of another in his absence without his knowledge, and without having any mandate authorising such acts or interference. The office is gratuitous, and the *negotiorum gestor* can claim nothing as recompense for the trouble or labour he may have been put to. He is entitled, however, to recover all expense incurred or outlaid by him in the course of his actings, and to interest on all money paid out; while, on the other hand, he is bound to account for all sums of money that may have come into his hands during that period. In the ordinary case, he is liable in the middle degree of diligence, being that diligence which a prudent man bestows on his own affairs; but this liability differs, according to the circumstances under which his interference takes place. In cases of great necessity, where immediate interference is necessary, he will only be liable for *culpa lata*; but where the interference was officious, he will be liable for *culpa levissima*.

Nemo cogitationis pœnam patitur.—No one suffers pu-

nishment on account of his thought or intention. A maxim taken from the civil law (Dig. L. 48, T. 19, l. 18), to the effect that no one can be punished on account of mere thought or mere intention, however malicious or criminal it may be. It must be followed by some overt act before it becomes a crime, or renders the person guilty of it amenable to punishment. The intention may, however, be charged as an aggravation, as where a man commits an assault with intent to murder. See *Conatus*.

Nemo debet ex alieno damno lucrari.—No one should be enriched out of the loss or damage sustained by another. A maxim of the Roman law, founded upon equity, the principle of which has been adopted by the Scotch law. Upon this principle the *negotiorum gestor* recovers that which he has expended on behalf of one who is absent, and unable to guard his own property, or manage his own affairs. This maxim also finds application in the case where one builds a house upon ground which he believes to be his own, but which ultimately proves to be the property of another. In such case the owner of the ground takes the house as an accessory to his land, but he is bound to indemnify the person building *bona fide*, to the extent at least to which he has been benefited by the other's labour and outlay.

Nemo locupletandus est cum detrimento alterius.—No one is to be enriched through the damage of another. This is another form of the preceding maxim. Erskine quotes it as the ground on which an exception is founded to the general rule, that a minor is not bound by contracts or engagements entered into by him during minority; and the following passage may be given as affording an additional illustration of the principle of the phrase to those given in the preceding article:—"This rule obtains, contrary to the nature of contracts, both from the favour of minors, to whom the law has not denied the power of making their condition better, though they cannot make it worse, and *in pœnam* of those who would impose upon their weakness. But it is to be received with the two following exceptions: First, minors are effectually obliged, by their own acts and deeds, and even by bonds of borrowed money granted by them, though without the consent of their curators, for all sums that have been profitably applied

to their use, in which case the maxim holds, *nemo locupletandus,*" *&c.* B. 1, T. 7, § 33.

Nemo potest immittere in alienum—No one can throw or place anything on the property of another. This phrase regards the absolute right of property which every proprietor has in the subject of which he is possessed, *a cœlo usque ad centrum.* Without the servitude of stillicide duly constituted, no one is entitled so to build his house that the eaves-drop or rain flow shall fall therefrom on his neighbour's property. Nor can any one support his house by building against or upon the gable of his neighbour's house, without a legal right so to do, acquired by permission or otherwise.

Nemo potest sibi mutare causam possessionis.—No one can of himself change the cause or ground of his possession. This rule is taken from the civil law (Dig. L. 42, T. 2, l. 3, § 19), and signifies that no possessor, whose possession commenced upon one title, can alter it, by afterwards ascribing it to another. In Scotland this rule is not absolute in its application, for a possessor holding upon several titles may ascribe his possession to that one which is surest and least liable to challenge. In such case, however, the title founded on must be an original right, and not merely an accessory to some other. See *Accessorium sequitur naturam, &c.*

Nemo presumitur malus.—No one is presumed to be bad, *i.e.*, guilty of any particular offence with which he may have been charged. Thus it is that no number of previous convictions, even if they be for the same description of crime, are allowed to weigh against a prisoner on his trial, although they will and do aggravate his punishment on his being found guilty. He must be proved guilty of each offence, independently of what his previous character may have been.

Nemo tenetur edere instrumenta contra se.—No one is bound to produce writings against himself. This rule admits of very limited application in our law, and, indeed, can only be said to have application at all in criminal prosecutions. In such cases the panel is not bound, and cannot be called upon, to produce any document which will injure his defence, or aid the prosecution, any more than he can be called upon to give parole evidence in support of the case laid against him. It is different, however, in all civil actions, for there either party may be called upon and compelled, at the instance of the other, to

produce any document in his possession tending to support the case of his opponent. This rule is absolute, and no exception can be founded, either on the peculiar nature of the action, or of the document sought. The parties to a suit can not only be adduced by each other as havers, but may also (under the provisions of the recent Evidence Acts) be adduced as witnesses.

Nemo tenetur jurare in suam turpitudinem.—No one is bound to depone to a matter involving his own disgrace. No panel can be asked to swear, either in affirmation or denial of the charge laid against him, nor can any one be compelled to answer a question in the course of his deposition as a witness in a civil suit, if the answer will or may involve him in a criminal prosecution. This, however, is the limit to which the rule now extends; formerly the limits of its application were much more extended. A witness, formerly, might be asked, but was entitled to decline answering any question which involved even his shame or moral degradation, for it was thought that to compel witnesses to speak to their own shame, was likely to result in very frequent acts of perjury. Accordingly, in the case of *King*, 2d Feb. 1842, 4 D. 590, a witness was held entitled to decline answering, a question to the effect of, Whether she had "frequently been found fault with by various persons in whose service she was, for listening at doors and windows, and telling lying stories?" But the *metus perjurii*, on which this rule was founded, has been overcome by the obvious principle of justice, which entitles each party to a suit to elicit any fact from his adversary's witness reflecting on that witness's character or credibility. The rule now is, as already stated, that no witness can decline to answer a question put to him, no matter what disgrace it may involve, if it does not infer criminal prosecution. A witness has been held entitled, however, to decline answering a question which involves an admission of the guilt of adultery on his part, because, although no criminal prosecution has been raised on account of this crime for a century, it still stands on our books as a point of dittay. *Stephens*, 1839. 2 Swinton, 348. *Don*, 25 May 1848. 10 D. 1046. Reference may also be made to a valuable exposition of the limits of this rule, in Taylor on Evidence, § 1308, *et seq.*

Nemo tenetur seipsum accusare.—No one is bound to

accuse or criminate himself. This phrase is akin to the preceding one. No one is bound to answer any question, or produce any document, tending to involve him in criminal prosecution; but the rule goes no farther. See the observations on the preceding phrase.

Nexus.—A bond, tie, or fetter. An arrestment is said to impose a *nexus* upon the subjects arrested, because it imposes a legal restraint on the arrestee from parting with the custody of them. The reader will find this word frequently used in the civil law to signify a man free born, but who had been reduced to slavery on account of debts which he could not pay.

Nexus realis.—A real bond, or fetter; *i.e.*, any bond or fetter attaching to real or heritable property, and which restricts the owner's exercise of the absolute rights of property. Servitudes are so designated by our older writers; for an example of which see Stair, B. 4, T. 45, § 17. An inhibition, when it relates to heritage, is a *nexus realis*, placing a restriction, as it does, on the owner's right of disposing of his property; so also is an adjudication.

Nihil tam naturale est, quam unumquodque eodem modo dissolvi quo colligatur.—Nothing is so natural as that anything (any obligation) should be dissolved, or discharged, in the same manner as that in which it was constituted. In illustration of this rule, Erskine refers to the case of vicarage teinds, the right to which, being constituted by usage, may be extinguished by non-usage, "or by a disuse in payment." (B. 3, T. 7, § 13). All verbal obligations may be verbally discharged; but it is a general rule, that rights constituted by writing should be extinguished by writing. "The same solemnities that are requisite to a deed which creates an obligation are necessary in a written discharge of it." (Ersk. B. 3, T. 4, § 9). And so also, in treating of the extinction of obligations constituted by written instruments, Mr. Menzies says: "At a former period it was the practice, upon performance of an obligation, to rest satisfied with the cancellation of the instrument instructing it. This is not to be relied upon, however, as an effectual discharge. In a bond for money, the fact of payment cannot be proved by parole evidence, and there is, therefore, no available proof of the payment, while, although the bond be destroyed, the tenor of it may be proved; and

however improbable such a thing may appear at the time, a change of circumstances may arise, producing effects not now anticipated." (Menzies' Lectures, 260). Among the Romans this rule was very strictly applied; so much so, that the very same words were used in discharging an obligation (where it was one constituted *verbis*), as those which were made use of in its constitution.

Nisi aliud convenerit—Unless something else has been agreed upon; or, unless it has been otherwise agreed. Ersk., B. 2, T. 3, § 25.

Nisi cum sua conditione et causa—Except under the terms of the title and the burden of its conditions. Duff, in giving the opinion of Sir Thomas Hope as to the validity and effect of the irritant and resolutive clauses, invented in his time for the protection and maintenance of entails, says, "Of their combined effect he proceeds to give some account; and he declares his opinion to be, that except in questions with the Crown or the superior, they were valid declarations, effectual against the heirs as conditions of the grant, and against creditors-comprisers, because they cannot have the right "*nisi cum sua conditione et causa.*" Feud. Con. 335.

Nisi malitia suppleat ætatem—Unless malice supplies the place of age.—See *Malitia supplet, &c.*

Nobile officium—"The *nobile officium* of the Court of Session does not admit of a precise definition. Generally speaking, it may be said to be the equitable power vested in that Court, whereby it interposes to modify or abate the rigour of the law, and, to a certain extent, to give aid where no remedy could be had in a court confined to strict law." Bell's Dict. *h. v.* Stair, B. 4, T. 3, § 1. Ersk., B. 1, T. 3, § 22.

Nomen juris—A word employed in legal phraseology, having a recognised technical signification; as, for example, heritage, conquest, &c. Heritage includes all heritable property acquired by descent, while conquest includes all property of the same character, acquired by purchase, gift, or other singular title. "A nominate right is a right possessing a *nomen juris*, the use of which defines its boundaries, and settles the consequences to all concerned. These rights generally receive a *nomen juris*, which are frequently the subjects of contract, and of legal discussion; while other rights, of infrequent

occurrence, remain innominate, and must be determined by the application of the law to the circumstances in the particular case. The nominate and innominate contracts illustrate the doctrine. Where two parties enter into a bargain, recognised as a nominate contract, such as sale, the legal rules which regulate its operation are at once understood, and the reciprocal rights of the parties are implied in the mere *name* of the contract. The law supersedes the necessity of special stipulations, and creates an obligation in the one party to perform, and a right in the other to demand, whatever is necessary to the explication of that contract." (Bell's Dict., *voce* Nominate, &c.) "It is equally futile to attempt to interrupt the legal course of succession by words of disinheritance. *Exhæreditation* is not a *nomen juris* by the law of Scotland; and a writing declaring certain heirs to be disinherited conveys no right to any one. The heir-at-law, therefore, can only be excluded by granting an effectual conveyance to another party." Menzies' Lectures, 661.

Nomen universitatis—Literally, the name of the whole together; that is, a name under which many rights of different kinds are included, so as in legal effect to embrace them all as one right. Thus the name Barony is, in our law, a *nomen universitatis*, for it includes not only the lands over which the rights of barony extend, but also the rights competent to the owner of the barony themselves. A conveyance of a barony conveys all the lands which constitute it, although not specially named or described, as well as all rights, such as servitudes, &c. which pertain to them. Formerly, when sasine was necessary to perfect an heritable right, sasine given on any part of the lands of a barony was sufficient to infeft the disponee in the whole, whether they lay discontiguous, proceeded from different superiors, or were held by different tenures. All the rights pertaining thus to a barony were held as expressed in, and conveyed under, that one name.

Nomina debitorum.—Literally, names of debtors; but signifying in the civil law, (and in our law, when used), personal debts. *Nomina* came to signify debts, because the names of the debtors were entered, along with the amount due, in the *tabulæ* of the creditor. See *Liberatio nominis.*

Nominandus.—To be named. When an entailer reserves

right to himself in his deed of entail to nominate an heir or substitute by a separate deed of nomination, such heir or substitute is called *nominandus*. To be effectual, it is thought that such a deed of nomination must be recorded in the Register of Tailzies, although this has not been expressly decided. Duff's Feud. Con. 346.

Nominatim.—By name. Heirs *nominatim* are those who are specially called by name to the succession. This name is given in contradistinction to that conferred on a person called to the succession who is not yet born (*nascituru*s), or one to be subsequently named (*nominandus*). The difference between them will be understood at once from the following form of a clause of destination: "I dispone to and in favour of (1) A. B. my son, whom failing (2) the heirs male to be born of his body, whom failing (3) to any person or persons I may appoint by a writing under my hand, all and whole the lands of," &c. In this clause the disponer's son is called *nominatim*, his children *nascituri* are called on the failure of their father, and on their failure the disponer calls the heir *nominandus*.

Nomine albæ firmæ.—In name of blench-farm; in return for lands held blench. Blench-holding is one of the tenures by which lands are held in Scotland, and the payment made to the superior in lieu of all other service is generally elusory, such as a penny Scots. This return, in itself of no value, and rarely, if ever, exacted, is yet of importance in so far as it preserves the superior in his right to the casualties of superiority. "Craig informs us, that the holding now known by the name of blench, was originally called *feudum francum*, because the vassal was free of all feudal services, being bound only by an oath of fealty. It arose when the feudal manners began to give place to a certain degree of industry and civilisation, and superiors who were in want of money were willing to give lands to their vassals at nominal or quit rents, in consideration of a large sum advanced in a single payment." (Duff's Feud. Con. 49). The extent of land held under this tenure was greatly increased by the Act 20 Geo. II. cap. 50, which converted all lands then held ward of the Crown (a holding abolished by that Statute) into blench-holding. This tenure is not now adopted in the constitution of an original right.

Nomine damni.—In name of damage; on account of loss. Interest is said to be due to a creditor in name of damage, or as a recompense for the loss he is supposed to sustain through his debtor's delay in making payment of his debt. Ersk. B. 3, T. 3, § 80.

Nomine dotis.—In name of dowry or tocher.

Nomine feudifirmæ.—In name of feu-farm; on account, or in return for lands held feu. Feu-holding is now the most common tenure by which lands are held in Scotland, and the return which the vassal is bound to render to his superior for lands so held, is called feu-duty. This duty may consist either of a stipulated money payment, of grain, cattle, &c., or of services. The latter, to entitle the superior to exact them, must be of a valuable description, or merely occasional, as *ex. gr.*, attendance with a boat and rowers for the use of the superior and his family; because all services strictly personal and *quasi* military were abolished by the Statute 20 Geo. II. cap. 50.

Non compos mentis.—Of unsound mind.

Non constat.—It does not hold; that is, it is not to be assumed. Thus, it may be argued by one of the parties to a suit, that admitting certain statements made by the other, *non constat* that another statement made by him is necessarily correct. The difference between this phrase, and the phrase *non sequitur* is this: the former refers to an unwarranted assumption of fact, the latter to an illogical inference or conclusion.

Non creditur referenti, nisi constet de relato.—The reference is not to be believed, unless the thing referred to is otherwise proved or certain. Thus, an instrument of sasine does not prove the existence of the charter, or other warrant, to which it refers; nor a charter of resignation the procuratory on which it proceeds.

Non entia.—Things having no existence; nonentities. Certain writs are disregarded by our law and treated as if they did not exist at all. Thus, a bill or promissory-note not duly stamped cannot be looked at by the Court to any effect or purpose whatever. Regarded as a bill, it is *non ens*. Thus, also, "a deed signed by one naturally incapable of consent, as an idiot, or by one whom the law presumes to be such, as a pupil, infers no degree of obligation, and is truly no deed, but

a kind of *non ens*, which cannot admit of homologation." Ersk. B. 3, T. 3, § 47.

Non memini.—I do not remember. Where a party to whose oath the resting-owing of a debt, or a payment, is referred, swears that he does not remember receiving the goods charged for, or of his incurring the debt, or of receiving the alleged payment, such oath has, in the general case, the effect of absolving him, as the oath is no evidence of the point referred; but if the fact referred is so recent that the deponent cannot be believed to be ignorant of it, or to have forgotten it, he is considered as concealing the truth, and will be decerned against, in the same manner as if he had refused to depone. If the party to whose oath reference is made, depones negative of the point referred, there is an end of all proof on the subject—every other proof, however conclusive, is barred. But *non memini* not being equivalent to a denial of the fact, does not exclude the person making the reference from establishing it by proofs originally competent.

Non numeratæ pecuniæ.—Of money not paid. See *Exceptio non, &c.*

Non officiendi luminibus vel prospectui.—Of not obstructing the lights or prospect. This is a servitude whereby the servient proprietor is prohibited from building, planting, or in any way exercising his right of property, so as to intercept the light, or obstruct the prospect, of the dominant tenement. The servitude of light does not necessarily infer the servitude of prospect. If the dominant proprietor is entitled only to the former, the servient proprietor may exercise his right of property in any way he pleases, if he does not thereby intercept the light of the dominant tenement, although his operations should shut out the prospect entirely.

Non omne quod licet honestum.—Not everything which is permitted is honourable, or morally right; that is, there are some things permitted, or rather not prohibited, by the law, which are not honourable or moral in themselves. The distinction drawn by the phrase is between those things which a man is not prevented by the law from doing, and yet things which cannot be regarded in ordinary dealing as fair or just. Thus, a seller may so laud the character of his wares, or sell them at a price so enhanced or unfair, as to amount to a morally

dishonest act, yet the law will not reduce the transaction at the instance of the buyer. Again, a debtor may object that an unstamped obligation granted by him is not binding, because, although given to and accepted by his creditor as a mere acknowledgment of debt with obligation to pay, it must be held by legal interpretation to be a promissory note. Such a plea is neither honest nor honourable, and yet the law must give effect to such a plea, and refuse decree on the document libelled.

Non pars substantiæ sive fundi, sed accidens—Not a part of the subject or land, but an accident. Servitudes are here described, which being accidents of property, may or may not exist, and are not regarded as essential to the right of property in the land.

Non repugnantia—A withdrawal of opposition,—as in a conflict between contending claims. "The concurrence of one as a consenter (in an heritable bond) who possesses a prior security, does not import a conveyance of his right to the creditor, but a *non repugnantia*,—a departure from his preference in a question with this creditor." Duff's Feud. Con. 269.

Non utendo—By non-usage. Some rights are lost to their proprietor simply through his neglect to use them. Thus, servitudes are lost *non utendo* if the owner of the dominant tenement neglect to use his right for forty years together; and the right to vicarage teinds is lost by the neglect of the incumbent to levy them. Generally it may be said that any right may be lost by non-usage, which can be acquired by lengthened use.

Notabilis excessus—A remarkable, or very great excess. Stair, B. 1, T. 4, § 18.

Nova causa obligationis—A new ground of obligation. Actions containing penal conclusions are, in the ordinary case, considered personal, falling upon the death of the defender, and not transmissible against the heir. If, however, litiscontestation has taken place (that is, if the parties have proponed their respective pleas, and a proof of the facts has been allowed) such actions do transmit. This proceeds upon the principle, that the parties are held bound as if by contract, to abide by the decision which may be pronounced upon the proof to be

adduced,—a contract, in which the heir is held to represent his ancestor, although he did not represent him as regards his delict or its penal consequences. Litiscontestation is thus said to impart a *nova causa obligationis*, because it introduces an obligation to abide by the decision, differing essentially from that obligation on which the action originally proceeded.

Nova debita—New debts; that is, debts newly or recently contracted, as opposed to old or prior debts. A security granted by a debtor within sixty days of his bankruptcy for a debt contracted before that period is reducible as a fraudulent preference; so also is the payment of such a debt in such circumstances. But security or payment granted in consideration of a *novum debitum*—a debt presently contracted—is not reducible although granted within the sixty days.

Novalia—A term applied to lands recently improved or cultivated. In the beginning of the twelfth century almost all the religious orders in this country were freed by papal exemption from their liability for the teinds properly exigible in respect of the lands held by them. Towards the end of that century, the then existing exemptions were very much restricted, and all religious orders except three, were declared liable for the teinds payable out of their property. Exemption was, however, then extended to *novalia*,—lands which, having lain waste from time immemorial, had been newly brought into a state of cultivation by the monks at their own expense. It has, on a similar principle, been held that lands gained from the sea by embankments, or gained by the draining of a loch, are not liable for teinds to the titular or patron of the parish. See More's Notes to Stair, ccxxxix.

Novatio—Novation;—which is a mode of extinguishing an obligation already existing, by the substitution of a new engagement or obligation by the same debtor to the same creditor in its place. Thus, when a bill is given for the amount of an open account, novation takes place, the obligation being thereafter for payment of the bill, and not the account. Another form of novation is, when a new debtor is substituted for the old one, with consent of the creditor; this is generally termed delegation. See *Delegatio*.

Novatio non presumitur—Novation is not presumed. The new obligation must bear to be in satisfaction and complete

discharge of the one previously existing, or otherwise, it will *in dubio* be regarded as merely corroborative of it, or regarded as constituting a separate and additional obligation. Thus, where new bills are given in satisfaction of previous bills, unless the latter are delivered up to the debtor, the creditor will be entitled to sue on them, should the new bills be dishonoured. And in the case supposed, the creditor might sue on both, and the allegation that the new bills were merely renewals, could only be proved by his writ or oath. And so in delegation, where the obligation of the new debtor will not be regarded as discharging the obligation of the original debtor, unless this be distinctly stipulated. *In dubio*, the presumption will be that the new obligant is cautioner for, or co-debtor with the original obligant, and that the new obligation is granted in corroboration, or in security of that already existing. The legal presumption may, however, be redargued.

Novodamus.—Literally, we give of new. This name is given to any charter, original or by progress, by which the superior renews to his vassal a grant of lands already made. It is generally granted to obviate some defect in the previous title, or to supply the place of some deeds necessary to the progress which have been lost. Such a charter secures the vassal against the consequences of a defective title as in a question with the superior; and frees him from liability for arrears of feu-duties or casualties remaining due to the superior, for it implies a discharge of bygone duties. "The clause of *novodamus* may contain a first grant as well as the renewal of a former one, and every subject expressed is effectually conveyed to the vassal, although there be no antecedent title to it in his person." Menzies' Lectures, 773. See *De novo damus*.

Nuda patientia.—Mere forbearance or sufferance. The proprietor of the servient tenement over which another has the servitude of way, is not bound to keep the necessary roads in repair, his obligation being simply to permit or suffer the dominant proprietor to exercise his right of passage. Everything required for the exercise or enjoyment of that right must be provided and maintained by the dominant proprietor himself. "Neither can the fiar of a decayed house be compelled by the liferenter to put it in tenantable repair; because

a liferent being a servitude, binds the person burdened no farther than to *nuda patientia.*" Ersk. B. 2, T. 9, § 60.

Nudum officium.—The bare office or character, without any of the emoluments or advantages which generally pertain to it. Ersk. B. 3, T. 9, § 26.

Nudum pactum.—A mere paction; or engagement amounting merely to a promise. In England the phrase is used to signify an obligation for which no valid legal consideration has been given, and one, consequently, which cannot, according to the rules of English law, be enforced. "What amounts to a legal consideration, however, is a question liberally dealt with, and generally it is held that the promisor must either obtain some kind of advantage, or the promisee suffer some loss, injury, or inconvenience in respect of the promise. Mere love, affection, friendship, or a sense of moral duty, is not a legal consideration in this sense." (Paterson's Compend. § 441). In Scotland it is otherwise, for with us no distinction is recognised between *pacta nuda* and *non nuda.* If an obligation is granted, the granter of it can be compelled to fulfil it, or is subjected in damage for non-fulfilment, whether a consideration has been given for it or not.

Nudum pactum inefficax ad agendum.—A mere agreement is ineffectual to maintain action. Among the Romans an agreement did not in the general case create a civil obligation which could be legally enforced. In most cases, besides the mutual consent, something had to be transferred, certain words to be uttered, or written documents used, before an agreement became obligatory and a contract arose. Without these incidents, an agreement by which one promised to give or to do something, continued a mere agreement without any action attaching; except in the case of contracts constituted by consent alone, such as sale, location, &c. The *nudum pactum* of the Roman law, was one which through informality or want of the necessary ceremony, gave rise to no legal obligation; and it was immaterial whether the obligation was onerous or gratuitous. The question whether an agreement is *nudum pactum* by the English law, does not depend upon informality, but simply upon whether a legal consideration has been given for the obligation undertaken.

Nulla persona.—No person. *Persona* is any being regarded

as capable of having rights and undertaking obligations; and hence it includes, in its legal signification, not only mankind, but also such creatures of the law as cities, corporations, &c. On the other hand, all men are not *personæ;* rebels, for example, are not, because they can neither have legal rights, nor fulfil legal obligations; neither are pupils, who, on account of their non-age, are deemed incapable of exercising rights or undertaking obligations. A married woman is *nulla persona*, because the law regards her as merged in the person of her husband, and she is held incapable of undertaking any personal obligation. *Persona* originally signified the mask worn by an actor indicative of the character he, for the time, assumed, and so came to signify the different characters or positions a man might hold in his social or public life. Thus, the same man might have the *persona patris*, or *tutoris*, or *mariti;* that is, he might be regarded in his character of father, tutor, or husband.

Nulla sasina, nulla terra.—No sasine (or infeftment), no land. This phrase signifies that the fact of infeftment is that by which a right of property in land is to be tested. Until infeftment was taken there was no feudal, and therefore no indefeasible right in the lands. The abolition of infeftment has rendered the phrase meaningless; but the recording of the conveyance comes now in place of infeftment.

Nummi pupillares.—Money belonging to a pupil. It is provided by the Act 12 and 13 Vict., cap. 51, § 5, that if a factor shall keep in his hands more than fifty pounds belonging to the estate over which he has been appointed for more than ten days, he shall be held liable to the estate "at the rate of twenty pounds per cent. per annum on the excess of the said sum of fifty pounds, for such time as it shall be in his hands beyond the said ten days."

Nunc valent et quantum valuerunt tempore pacis.—What is the value of the lands now, and how much were they worth in time of peace? This was one of the enquiries directed to be made by the brieve of inquest under the old form of special service; the purpose of which was, to fix the value of the lands, so that they might bear their proper proportion of public subsidies and taxes, and also that the rights of the superior under his different casualties might be ascertained. See *Antiquus, &c.*

Nunciatio novi operis.—An information lodged respecting a work unwarrantably commenced or threatened by another to one's injury. This was a proceeding under the civil law taken before the praetor, and was similar in character to our interdict. By it any one could be prevented commencing, or, having commenced, proceeding with a work injurious to another, which he was not legally entitled to perform. If, however, the work had been completed, the remedy to be adopted for its removal was of a different kind, varying according to circumstances. This is fully explained in the Digest, L. 39, T. 1. In illustration of this form of procedure reference may be made to Stair, B. 2, T. 7, § 23.

Nunquam concluditur in falso.—"A maxim importing, that in actions of reduction-improbation, on the head of falsehood or forgery, any relevant defence may be pleaded, or any additional proof brought forward, however late in the proceedings, provided decree has not been extracted. The application of this maxim has been very much limited in civil proceedings by the introduction of the new forms of process." (Bell's Dict. *h. v.*). Actions of the class referred to are now regulated by the same rules as those which regulate any other description of action. No statement can be added, nor additional pleas proponed, however important they may be, after the record has been closed; nor farther proof adduced after probation has been renounced. If the proposed additional statements can be shown to be *res noviter*, they may be admitted; but the privilege referred to in the quotation given above no longer exists.

Nunquam prescribitur in falso.—A prescriptive right can never be founded upon a falsehood; prescription never runs in favour, or in support of that which is criminally false. A title, however invalid, even when proceeding *a non habente*—from one having no power to grant it—may be rendered unchallengeable by the lapse of the negative prescription of forty years. But if the title founded upon be a forgery (which is a species of the crime known by the generic term, falsehood), it may be challenged at any time, for forgery attaches a *labes realis* to the title, which prescription cannot cure.

Nuptiales tabulæ.—Marriage tablets. This was a writing among the Romans, equivalent to our marriage-contract; and these words are intended to signify marriage-contract when used in Scotch law. See *Contra fidem, &c.*

O

Ob contingentiam.—On account of connection or similarity. Where two actions are depending before the court at the same time, between the same parties, and involving the same dispute, in which the one decision will dispose of the whole pleas of parties, they may be conjoined *ob contingentiam*, on account of the connection existing between them.

Ob defectum hæredis.—On account of a failure of heirs. A person attainted for treason loses all his civil rights, and his property, heritable and moveable, falls to the Crown. But where a succession to heritage subsequently opens up to the attainted person, from which, by his attainder, he is excluded, it falls, not to the Crown, but to the immediate superior as escheat *ob defectum hæredis*. The heirs of such a person are excluded from all succession to an ancestor, where the propinquity betwixt the ancestor and them is necessarily connected by the attainted person, or where the attainted person would have succeeded to the estate of the deceased had it not been for his attainder. Attainder thus necessarily results in a failure of heirs. When any one leaving property dies without heirs and intestate, the Crown succeeds as last heir; and although this right of the Crown cannot be said to arise *ob defectum hæredis*, the Crown itself being heir, yet, in point of fact, it is in respect of the failure of heirs that the Crown succeeds to such estate as *bona vacantia*.

Ob metum perjurii.—On account of the fear of perjury; an apprehension on which certain evidence was at one time excluded, or left in the discretion of the witness whether to give it or not. See *Ob reverentiam, &c.*

Ob non solutum canonem.—On account of unpaid canon or feu duty. By the Act 1597, cap. 250, it was made a statutory condition of all feus, that if the feu-duty remained unpaid for two whole years together, the vassal should forfeit his right to the lands, in the same manner as if an irritant clause to that effect was engrossed in his infeftment. This being a penal irritancy, requires to be declared by an action, which is still competent to a superior, and is called an action of tinsel of the feu. The vassal may avoid the forfeiture by purging the irritancy (that is, by paying the arrears) at the bar, or at any time before extract. Where the irritancy depends upon the statutory enactment it is called legal, but where this is fortified by an express irritant clause inserted in the title, it is called a conventional irritancy.

Ob pias causas.—On account of religious reasons; dutiful considerations. "If legacies exceed the defunct's own part, then they abate proportionally, unless there be a preference granted by the testator, or a privilege by law, whereof I know none with us, for even a legacy *ob pias causas*, viz., a mortification to a kirk, was found to have no privilege, but it and other legacies suffered proportional deduction, seeing they exceeded the dead's part." (Stair, B. 3, T. 4, § 24). Provisions made by a son to his father *ob pias causas* are those which proceed from the affectionate regard and natural duty which the son is bound morally to render to his father.

Ob reverentiam personæ et metum perjurii.—On account of reverence or respect to the person, and the fear of perjury. On these reasons were founded the exclusion of certain persons as witnesses, as well as the right which a witness in certain circumstances had of declining to answer the question put. On account of the former, all persons standing in the position of relationship to the suitor for whom they were proposed to be adduced, were excluded as incompetent witnesses, because it was apprehended that the respect or reverence they had, or were supposed to entertain, for their relative, would prevent them telling the truth, or the whole truth. All exclusion on the ground of relationship (unless it be the relation of husband and wife, and that only in a few cases excepted from the general rule) has been abolished. The *metus perjurii* was that on which chiefly witnesses were entitled to decline an-

swering any question put to them, where the answer involved a confession of an indictable offence, or of moral delinquency, or shame. In any such circumstances it was feared that the witness would screen his guilt or shame by perjury rather than confess it truthfully, and therefore he was entitled to decline answering any question involving such consequences. The necessity, however, of obtaining such evidence for the due administration of justice, together with the recognised principle that the desire for truth must prevail over the fear of perjury, have overturned this rule, and no witness can now decline to answer any question which may be put to him. There is still an exception with reference to questions, the answers to which involve the confession of an indictable offence. Such questions a witness may still decline to answer; but this privilege is accorded upon the principle of the maxim *nemo tenetur seipsum accusare*, and not upon the *metus perjurii*.

Ob turpem causam.—On account of a dishonourable cause, or immoral consideration. An obligation which has been granted on account of an immoral consideration, as, for example, a bond or bill granted as the price of prostitution, cannot be enforced. No action or diligence can be maintained on such a bond or bill, and that whether the consideration appear *ex facie* of the obligation or not. There is a distinction drawn between an obligation granted as the price of prostitution, and one granted subsequent to such a connection as a provision due in honour and justice to a young woman who has been seduced; the latter may be enforced although the former cannot. But even in the latter case, if the connection has been adulterous, action will be denied on the obligation, if the woman knew at the time of the connection that the man was married. Although action does not lie upon an obligation granted *ob turpem causam*, yet, if it has been implemented, no action will lie, on the other hand, for restitution.

Obæratus.—A person involved in debt. Stair, B. 1, T. 9, § 15.

Obiter dictum.—An opinion given incidentally. In the course of pronouncing their decision in a case before them, judges sometimes give opinions incidentally on points which may have been raised, but not being essential to the case, have not been fully discussed or weighed. Such opinions are called *obiter dicta*; they are not considered as authoritative, nor

would they be received as such by the Court, if the question on which they had been expressed came up at a subsequent period for judgment. They are only of importance commensurate with the reputation of the judge delivering them.

Obligatio literarum.—An obligation constituted by writing. Among the Romans contracts were divided into four classes, which took their names from the manner in which they were constituted. Contracts were constituted, (1) *re*, when the delivery of something was essential to their constitution, as in pledge, deposit, &c.; (2) *verbis*, when certain solemn and formal words were necessarily used, as in stipulation; (3) *literis*, when the contract was constituted by writing, as in the case where a debtor became bound for the debt regarding which he had made entries in his *tabulæ* corresponding to those in the *tabulæ* of his creditor (explained under the phrase *liberatio nominis*); and, (4) *consensu*, where consent alone was required, as in sale, partnership, &c. Hence contracts were said to be real, verbal, literal (or written), and consensual.

Obtorto collo.—By the throat. "Absents, because they are incapable of making a defence, cannot be prosecuted criminally. It was a rule long observed by the Romans, that neither criminal nor civil causes could be tried in absence; and hence, when a defender would not voluntarily appear in judgment, the only remedy left to the pursuer was, to drag him by open force to the court, *obtorto collo*." Ersk., B. 4, T. 4, § 83.

Officium nemini debet esse damnosum.—An office should inflict damage or loss upon no one. The meaning of this maxim is, that no one should be subjected to loss by the discharge of an office or duty. Thus, a tutor or curator, whose office is gratuitous, is entitled to be indemnified for all that he has disbursed on behalf of his ward, in the performance of the duties of his office during its continuance. So, likewise, a mandatory is entitled to demand from the mandant all reasonable expenses disbursed by him, and the damage sustained by him in the execution of the mandate, even although the management should not have been successful or prosperous. A *negotiorum gestor* is in a similar position; and the fact that he takes the office upon himself (unless his acts amount to needless and officious interference), makes no difference in

this respect, between him and a regularly authorised mandatory.

Officium virile.—An office of or belonging to a man. The office of tutor or curator among the Romans being a public office, none but a man could fill it, except in certain cases where, by the special authority and permission of the Emperor (C. L. 5, T. 35), women were allowed to assume the office and perform its duties. This, and any other office or duty which a man was appointed to perform, was termed *officium*, or *munus virile*. In Scotland, any one may be named as tutor who is of full age, except a married woman, who, being herself under the curatory of her husband, cannot act as tutor during the subsistence of her marriage.

Omissa et male appretiata.—Things omitted and erroneously valued. See *Ad omissa, &c.*

Omne quod in se erat.—All that one had in his power; everything that he could do. Ersk., B. 1, T. 7, § 44.

Omne verbum de ore fideli cadit in debitum.—Every word sincerely spoken will constitute obligation. This phrase is taken from the canon law, and expresses the difference which existed between its provisions and those of the civil law on the subject of pactions. By the latter, mere words or promises had not the effect of constituting a binding obligation, unless some act or deed followed upon the words, or unless they were solemn words (such as those used in *stipulatio*), and recognised by the law as sufficient to constitute an obligation. Such mere words or promises were regarded as *nuda pacta*, were not binding, and gave rise to no action. By the canon law, on the other hand, all words spoken, and promises given sincerely and in earnest, were regarded as binding, and implement could be enforced by action; and this is the rule followed by the Scotch law.

Omni exceptione major.—Beyond all exception; unexceptionable. This is frequently said of witnesses whose known character places their evidence beyond all suspicion. An instance of the use of the phrase will be found in Ersk. B. 4. T. 2, § 29.

Omnia grana crescentia.—All growing grain. Thirlage when constituted by writing differs in its extent according to the terms in which the grant is expressed. It may either be

of (1) all growing corns, including barley; (2) of all grindable corns, which is held to mean those corns alone which are ground for use within the thirl, and which the mill is fitted to grind; or, (3) of all corns brought within the thirl, which includes all corns brought within it for use or consumpt, although not of the growth of the astricted lands. When the thirlage was of the first of these three kinds, the grant was expressed in the words of the phrase. Thirlage being a monopoly in favour of the miller, and a heavy burden upon landholders and feuars, was never regarded with much favour by the law, and is now almost unknown.

Omnia rite et solemniter acta esse.—That all things were done duly and in the usual manner; or, that all things were solemnly done and with the usual ceremony. This is one of the presumptions of law, and may be illustrated by a reference to the old procedure of giving sasine. If the instrument of sasine, properly authenticated and recorded, set forth that sasine had been given to the disponee upon production of his warrant, by delivery of the usual and necessary symbols in presence of witnesses, the law presumed that sasine was duly given, and that the ceremony usual in such a case had been properly observed. An objection that the ceremony was not observed, or that the prescribed symbols had not been delivered, could not be listened to so long as the instrument of sasine stood unreduced, for it was presumed that everything was duly and solemnly performed. This presumption might, however, like all other legal presumptions, be redargued.

Omnium bonorum.—Of all goods, or effects. A disposition *omnium bonorum* is one by which the granter conveys the whole estate and effects of which he is possessed at the time of granting. Such a conveyance is required of every one obtaining the benefit of the process of cessio, and until it is granted no extract of a decree can be given which confers upon the applicant that benefit. A conveyance of this description is likewise required from an incarcerated debtor, who seeks to be alimented by his creditor under the Act of Grace (1696, cap. 32); and if he refuse, after being requested, to execute such conveyance, he is entitled to no aliment while so refusing, 6 Geo. IV. cap. 62, § 7.

Onera realia.—Real burdens; which are burdens or in-

cumbrances affecting land, and exigible from it. They are distinguished from personal burdens, which only affect and are exigible from the person upon whom they lie. A single example may illustrate the nature of both. It is a common enough practice, when lands are sold, for the seller not to insist on payment of the full price at the time of the sale, but to allow a part of the price to remain on the lands as a burden. If the balance so left be declared in the sasine (or, now, in the conveyance) to be a real lien and burden affecting the lands themselves, and as such be entered upon the record, it is a burden for which the lands may be attached and sold, into whose possession soever they may come. But if the burden of payment of the remainder of the price be laid upon the purchaser alone, and not upon the lands, then the burden is personal, and a subsequent purchaser from him incurs no liability therefor, the lands not being affected. Again, a testator in conveying his lands to his heirs may declare that the conveyance is granted under burden of the payment of certain legacies. If the declaration be in such general terms, it will only impose a personal obligation upon the heir, and the lands would pass to a purchaser from him free of any such incumbrance; but if the testator declares the specified legacies to be real burdens affecting the lands, and this appear from the recorded title, then the lands are answerable for the same, whether they have been disponed by the heir to a purchaser, or been adjudged by the heir's creditors. In the former case, the legacies would be lost in the event of the heir's death or insolvency after having squandered the succession; in the latter, the legacies would be indefeasible, so long as the lands remained. Personal burdens, it may be observed, are not binding upon singular successors, but real burdens are; and all that is necessary to constitute a burden real, is an explicit declaration that it shall be so, and that such declaration shall appear upon the public records.

Oneris ferendi.—Of bearing a weight or burden. This was one of the urban servitudes of the civil law, in virtue of which the dominant proprietor was entitled to rest the weight of his house in whole or in part on the wall or property of the servient proprietor. There was this distinction between the servitude *oneris ferendi* and other servitudes, that as the

latter only consisted *in patiendo*, the servient proprietor was not bound to do anything to maintain the dominant proprietor's right, while in the former, the servient proprietor was bound so to keep and maintain his pillar or wall as to be capable of sustaining the dominant proprietor's buildings which rested upon it. This servitude has been imported into our law, but the distinction between it and other servitudes above alluded to, is not regarded. A special contract is with us necessary to render the servient proprietor bound to maintain the support on which his neighbour's property rests.

Onus probandi.—The burden of proving. The general rule is that the party making an allegation must prove it. Thus, the burden of proving a claim which is denied, lies on the pursuer who advances or maintains it, and on his failure to do so, the defender is assoilzied. The burden of proving, however, sometimes falls on the defender, as, for example, where he admits that he owed the sum sued for, but alleges that it has been paid; in which case the proof of such payment is incumbent upon him. This rule does not apply where there is a legal presumption in favour of the allegation made. So, in the payment of a debt made to a minor himself and not to his curator, action is competent against the debtor for repayment, on the ground that the payment made was to the lesion of the minor. In the ordinary case the minor would be bound to prove the lesion averred, but as the law presumes all such payments to be in lesion the rule does not apply, and therefore it falls upon the debtor to show that there was no lesion, but that the payment was *in rem versum* of the minor.

Ope et consilio.—By aid and counsel; equivalent to aiding and abetting, or art and part. Any one aiding and abetting another in the commission of some crime is himself regarded as criminal in that matter. "By *art* is understood the mandate, instigation, or advice, that may have been given towards committing the crime; *part* expresses the share that one takes to himself in it, by the aid or assistance which he gives the criminal in the commission of it." "The Roman law affirms, that a bare advice, though without doubt it deserves censure, infers no proper crime against the adviser, unless it be also proved that he has given actual assistance. But this doctrine has not been adopted into the law of any other nation." Ersk. B. 4, T. 4, §§ 10, 12.

Ope exceptionis.—By force of exception. An exception is a kind of defence, but the distinction between defences and exceptions is practically disregarded in the practice of our law. In the civil law (where it originated), an exception was a reason set forth by the defender, why he should not be condemned to pay or perform that which the pursuer claimed, founded upon some equitable ground, and of which the strict law could take no cognizance. For example, by the civil law no question was made as to how a *stipulatio* arose; its existence, if admitted or proved, was sufficient to entitle the stipulator to action thereon, and decree against the promissor. But many exceptions might be stated by the promissor, on account of which the stipulator could be defeated on equitable grounds, although at strict law he was entitled to judgment. It might be excepted, that the stipulation was forced or extorted from the promissor under fear (*exceptio metus causa*), or that the sum for which the promissor had given his obligation had never been paid to him (*exceptio non numeratæ pecuniæ*). When, therefore, an exception was pleaded before the Praetor, he inserted it in the *formula* which he sent to the *judex* who tried the case, and as that *formula* directed decree to be given, *except* (or unless) the stipulator had been guilty of the fraud, &c. averred, hence arose the name of exception. Even in the time of Justinian, however, the word came to mean, as it does with us, any defence other than a denial of the right of action, urged by the defender before the magistrate or judge. A single instance may illustrate the distinction between defence and exception, as held in Scotland, although, as we have said, this distinction is practically disregarded. If A. suing B. for the price of certain goods ordered by and delivered to him, be met with the statement that the goods were never either ordered or delivered, this is a defence; but if B., admitting the receipt of the goods, pleads that he has already paid the price thereof to A., this is an exception. For an example of the *formula* of the civil law, see *Judices dati*.

Optima fide.—In the best faith.

Opus manufactum.—Artificial work; in contradistinction to that which is natural. Thus, an embankment or bulwark reared by a riparian proprietor to prevent the inundation of

his land in the event of a flood, is *opus manufactum*, as distinguished from the natural bank of the river.

Ossibus usufructuarii inhæret.—A phrase implying that a right of liferent is a right personal to the liferenter, intransmissible, and ceasing upon his death. A liferent right, which is either legal or conventional, is one which entitles the holder of it to use and enjoy the subject of it during his life. The legal liferents are terce and courtesy; all others are conventional, for the subdivisions of which see Ersk., B. 2, T. 9, § 40, *et seq.* The right of liferent is intransmissible; and although an assignation of a liferent is common enough in practice, yet such an assignation does not convey that right itself, but merely the benefits arising from it. Accordingly, an assignee only enjoys the fruits of the subjects liferented during the cedent's life, and not during his own, if he be the survivor.

P

Pacta dant legem contractui.—The stipulations of parties constitute the law of the contract. The intention of the parties to a contract, and the agreement into which they have entered, is the rule upon which the law will proceed in enforcing fulfilment of the obligations undertaken, even where such agreement is contrary to the general rule of law regarding such contracts. Thus, in the contract of partnership, the rule upon which the law proceeds in regulating the rights and obligations of the partners is, that each partner is entitled to an equal share of the profits, and is liable for an equal proportion of the losses. But if the parties have stipulated that their proportions in the profit and loss shall not be equal, the terms of the contract will afford the rule for its enforcement. So, again, although the rule of law is, that the risk attaching to a subject sold but not delivered lies upon the purchaser, yet the law will recognise the risk as lying upon the seller, if that has been the bargain between the parties. The law refuses to recognise the conditions and terms of a private contract only when they are illegal, against sound policy, or *contra bonos mores*. See *Lex contractus*.

Pactis privatorum non derogatur juri communi.—The common law is not derogated from by the private contract of individuals. This maxim of the civil law imports, that no private bargain or arrangement between individuals can validate any contravention of the law, or render that valid and binding which the law declares to be invalid and ineffectual. Thus, an agreement not to object to an obligation for a debt incurred at gambling, does not validate the obligation or bar

objection, because the fixed rule of law is that such obligations cannot be enforced. Nor, in like manner, will such an agreement validate an obligation which proceeds *ob turpem causam.* An agreement by a married woman, that she will not object, on the ground of her being a wife, to a personal obligation which she has incurred, will not sustain an action brought upon that personal obligation; and a farther illustration of this principle will be found in Ersk., B. 2, T. 6, § 50. This maxim may be regarded as in a great measure the counterpart of the preceding one, and applies merely to all contracts which are in themselves illegal, impolitic, or *contra bonos mores.* It is not therefore to be regarded as absolute, for there are some legal provisions which may be derogated from by private bargain. Thus, it has been decided that an obligation by a party, that he shall be satisfied with the evidence of one witness, is binding, although the rule of law is, that one witness is insufficient to prove anything.

Pactis privatorum publico juri derogari nequit.—Another mode of expressing the preceding maxim, not unfrequently used.

Pactum.—A bargain, agreement, or paction. A paction is, in the civil law, defined to be, "the consent and agreement of two or more persons in the same matter, or regarding the same thing." Dig. L. 2, T. 14, l. 1.

Pactum corvinum de hæreditate viventis.—An agreement concerning the succession of one still living. Among the Romans, any agreement on the part of an heir to sell his right of succession during the life of his ancestor, was forbidden as *contra bonos mores;* as also was any obligation which was to be discharged by the heir out of the succession of his ancestor, when this had devolved upon him by the ancestor's death. A different rule obtains in Scotland and England, where it is quite lawful for the heir to dispose of his *spes successionis,* or to burden the succession by a post-obit. Any want of favour with which such transactions are regarded, arises purely from their inherent indelicacy, and from the offence they give to right moral feeling; but they are as effectual as any other kind of legal obligation or transference.

Pactum de assedatione facienda et ipsa assedatio æquiparantur.—An agreement or bargain to grant a lease is equal to

the lease itself. If a landlord enters into a missive of lease with one proposing to become his tenant, binding himself to let the lands, and to execute a regular lease at a future period, the missive is as binding, if possession by the tenant followed upon it, as the lease would have been if then executed. *Rei interventus*, if to a sufficient extent, has, in this respect, the same effect as possession. Thus, improvements made upon the land on the faith of such missives, if made in the knowledge of and without obstruction from the landlord, will give effect to an informal or irregular missive, although no possession has followed upon it, where the term of entry does not arrive until after the date of the improvements. Such missives, however, even with *rei interventus*, are not sufficient to secure to the proposing tenant the lands or farm he has taken. For if the landlord should thereafter let the lands or farm, and give possession to another tenant, the first has no preferable claim on which he could deprive the second of possession; he has merely an action to enforce implement of the missives, failing which, for damages on account of breach of the contract thereby entered into. This maxim only applies to those cases where, upon informal or imperfect missives, possession has followed, in which case they are as binding upon both landlord and tenant as a regular lease, seeing that they contain all the conditions of the lease, and that they have been acted upon. The maxim, as here given, is sometimes written with these additional words: "*præcipue si possessio sequatur*,"—especially if possession follows.

Pactum de non petendo.—An agreement not to seek; *i.e.*, an agreement by which the creditor in an obligation binds himself not to seek or to enforce its fulfilment; forming one of the well known exceptions of the civil law, and thence imported into the law of Scotland. This agreement might either be absolute or temporary; in the former case it operated as a renunciation or discharge, and absolved the debtor from his obligation. If the agreement was merely temporary, its effect was only that of sisting execution upon the creditor's diligence, until the expiry of the time during which the creditor had bound himself not to seek performance. In treating of the defence afforded by this *pactum*, Stair says, "If it be only temporary, for a short time, it doth not exclude a decreet, but only the

present effect thereof, whereby the decreet is granted conditionally, to pay or perform at the time to which the delay is granted; but it maketh the pursuer liable to the expenses of plea, *plus petendo tempore* (that is, of having sought before the agreed on time). And, being dilatory, it must be instantly verified; yet, if it be a long delay, it will procure a time to prove it, and will absolve the defender from that process, seeing he is not obliged to lie under the process for so long delay, and therefore a new citation will not revive that process; yet it will not hinder a new process to be raised after the time of delay is past." Stair, B. 4, T. 40, § 31.

Pactum de quota litis.—An agreement for a share of the subject of a law-suit. This is an agreement made by an advocate or law agent to receive, in return for professional services, a portion of the subject of the suit instead of the usual fees. It is regarded as an illegal contract, and is void at common law; and accordingly, in the case of *Johnston*, 1st Feb. 1831, an agreement entered into between an agent and his client, to the effect that if a certain suit was successful, the agent should receive the half of the property recovered, and, if unsuccessful, he should charge nothing for his outlay or trouble, was held null, and the action raised upon it dismissed. By the Act 1594, cap. 216, it was enacted, that any member of the College of Justice (extended by practice to practitioners before the inferior courts) who should purchase any property at the time forming the subject of a law-suit, should be punished by deprivation of office, place, and privilege. The course of decisions has been to sustain the purchase as valid, and to regard the penalty as the only sanction of the Act.

Pactum de retrovendendo.—An agreement concerning the selling back of a subject. This paction of the civil law was one which could competently be adjected to a contract of sale, and by it the seller reserved right to himself to purchase back that which he had sold within a certain time. There do not appear to be any examples, in the law of Scotland, of such an agreement being made with regard to the sale of moveables; but there are instances of such agreements in reference to the repurchase of heritage. The right of pre-emption reserved by a superior is an example of this paction, differing from the agreement of the civil law, however, in this, that it is not

limited to a certain time, but may be exercised sooner or later, as the vassal may wish to retain or dispose of the subject, and that the exercise of the right is not dependent upon the will merely of the superior, as it was upon the will of the seller. Another illustration may be found in the right of reversion which the debtor under a wadset had, although there, again, the reverser might redeem his subjects, even after the lapse of the prescribed time, and at any time before declarator of the irritancy.

Pactum donationis.—An agreement to give in donation. Such an agreement confers upon the donee no right in the subject agreed to be given, as the donor continues proprietor until delivery. The donor may, therefore, even gratuitously, give and deliver it to another, who thereupon becomes proprietor. This paction, however, according to Erskine (B. 3, T. 3, § 90), confers upon the first donee a *jus ad rem*, in respect of which he may sue the donor for performance, or damages for breach of agreement, if performance be refused or be rendered impossible by the act of the donor.

Pactum illicitum.—An illegal agreement or contract. This term is applied generally to all contracts which are contrary to law, *contra bonos mores*, or opposed to the principles of sound policy. No contract, which can be shewn to belong to this category, can be legally enforced. Such, for example, are contracts entered into, or obligations granted *ob turpem causam*, obligations arising from betting or gambling transactions, the *pactum de quota litis*, contracts imposing restraints on marriage, &c. Although such obligations cannot be enforced, yet where they have been fulfilled no action will lie for restitution, for the same illegality which bars the right to enforce, bars also the right to claim restitution when implement has been made.

Pactum legis commissoriæ.—An agreement, under which the seller, in a contract of sale, was entitled to the benefit of the *lex commissoria*. The *lex commissoria* was the name given to a clause often inserted among the Romans in conditions of sale, whereby the seller reserved right to himself to rescind the sale, if the purchaser did not make payment of the price of the subject sold within a certain time. This condition did not make the purchase a conditional one; on the con-

trary, the sale was regarded as absolute, but subject to be rescinded at the pleasure of the seller, if the price was not paid by the time specified; and, accordingly, if the subject was destroyed or lost before the arrival of the agreed on term of payment, the loss fell upon the purchaser. It was necessary for the seller, if he intended taking advantage of his right under this condition, to intimate this to the purchaser as soon as the condition was broken. If he received or claimed any part of the purchase money after the day agreed upon, he thereby waived the right which the *lex commissoria* conferred upon him. It was usual to insert in this clause an agreement, that if the seller had to sell the subject again, the first purchaser, (who had failed to make payment) should be liable for any difference which might arise between the price at which he had bought it and that which it brought at the second sale. The *pactum legis commissoriæ* was intended solely for the benefit of the seller, and could not be enforced against his will by the buyer.

Pactum legis commissoriæ in pignoribus.—An agreement giving to the pledgee the benefit of the *lex commissoria* in contracts of pledge. The *lex commissoria* in pledge, was a condition attached to the contract, under which, if the pledger failed to redeem the subject pledged within a certain time, his right of redemption ceased, and the pledge became the absolute and irredeemable property of the pledgee. This condition, at one time very common, was, at a later period of the history of the civil law (A.D. 326), declared to be illegal by the Emperor Constantine. In Scotland, under the Pawnbroking Acts, a subject pledged is forfeited if not redeemed within a year, or, on certain notice being given by the pledger, within fifteen months; but even after that period, and at any time before the pledge has been sold as forfeited, the pledger has the right of redemption on making payment of the sum advanced, with the interest which may be due thereon.

Pactum liberatorium.—An agreement whereby a real right is departed from or restricted. Such agreements would seem to form an exception to the general rule, that writing must intervene in all that relates to land, in order to bar the power of resiling. Accordingly, it has been held that a mere verbal obligation, followed by no *rei interventus*, agreeing to

restrict an infeftment in security, cannot be retracted, and may be proved by the oath of the party restricting; and, in the case of *Ker*, 8th Feb. 1666, M. 8465, a promise to liberate part of the lands burdened with a liferent was sustained without writing. It may be doubted, however, whether such decisions would be followed were any similar question now to arise.

Pactum super hæreditate viventis.—An agreement concerning the succession of a person still living. See *Pactum corvinum, &c.*

Par in parem non habet imperium.—An equal has no power over an equal. An illustration of this maxim is afforded in the following passage from Stair, where it is used to indicate that a Lord Ordinary on the Bills cannot, where the circumstances are unaltered, pronounce a decision upon a bill presented to him, different from that already pronounced by the preceding Lord Ordinary on a bill concerning the same subject-matter, and at the instance of the same party. Both of such judges being equal, the one has no power to review or alter the decision of the other. "If a bill hath been presented and refused, the clerk of the bills ought to retain the bill; and if another bill be presented, he ought to show the Ordinary the refused bill, that if the new bill contain new matter of fact, he may pass or refuse it; but if it only contain new arguments of law or reason, urging the former points, he may not pass, but by a meeting of three, or by a report to the Lords; for *par in parem non habet imperium.*" Stair, B. 4, T. 1, § 68.

Paraphernalia.—The name given to those moveables which, notwithstanding the marriage, remain the sole property of the wife. They include her wearing apparel, jewels, all ornaments proper to her person, &c., which were hers before the marriage, and gifts of a similar character from her husband made before or on the marriage-day. Such effects are not subject to the husband's right of administration, nor can they be attached by the diligence of the husband's creditors. They may be impledged by the wife in security of her husband's debt without his consent, but she cannot validly impledge them without his consent in security of her own debts; without such consent the impignoration is null.

Parata executio.—A prepared or completed diligence; one on which the creditor may instantly proceed to operate so as to obtain payment, or fulfilment of an obligation from his debtor. Ersk. B. 3, T. 4, § 15.

Pares curiæ.—Literally, the peers of the court. *Curia* was the place or court where the superior exercised his jurisdiction over his vassals; and those vassals being alike subject to him, and lying under the same obligation to attend his court, were therefore styled *pares* or peers. The *pares curiæ* included all the vassals holding of the same superior. Their presence was, according to the ancient law of Scotland, so essential to the validity of a feudal grant, that it was void without it. Where the superior had no other vassal than the one to whom he was making the grant, the vassals of the neighbouring superiors were admitted to supply the place of the *pares curiæ*. The *pares* had also the power of judging in most cases falling within the jurisdiction of their superior, whether civil or criminal, from whence, says Erskine, (B. 2, T. 3, § 17), "the right which we retain to this day, of being tried in criminal prosecutions by a jury of our *pares* or peers, derives its original."

Pares curtis.—The members of the superior's court; but generally written *pares curiæ*. The term *curtis* is very rarely used in the sense of *court*,—being almost invariably used to signify the whole domain over which the superior exercised jurisdiction, as well as that jurisdiction itself. An example of its being used to signify the superior's domain, will be found in Ersk. B. 2, T. 4, § 5.

Pari passu.—In equal grade; equally. When creditors claiming a common fund and competing as to their rights of preference, as in an action of multiplepoinding, are preferred to the fund equally, or share and share alike, they are said to be preferred *pari passu*. Where one of the claimants is preferred to the fund to the extent of his claim, before all the other claimants, he is said to be preferred *primo loco*.

Paries oneri ferundo, uti nunc est, ita sit.—The wall for bearing the burden, as it now is, so let it be. These were the words used in the civil law for constituting the urban servitude *oneris ferendi*, and under which the servient proprietor was bound to keep the wall on which his neighbour's tene-

ment rested, in such a sufficient state of repair, as to ensure its supporting the weight laid upon it. See *Oneris ferendi.*

Pars contractus.—Part of the contract. Verbal consensual contracts are binding upon the contracting parties immediately upon their consents being interchanged, and neither of them can afterwards resile from the transaction without subjecting himself to damages for breach of contract. But if it be agreed that their contract shall be reduced to writing, such agreement being *pars contractus*, the contract is not finally entered into nor does it become binding, until the writing has been executed. The law regards such a stipulation as a reservation of the right to resile, and, consequently, either of the parties may resile at any time before the execution of the writing. Even in such a case, however, the right to resile is cut off, if anything has been done by the parties or by any one of them, in the knowledge and with consent of the other, in dependence upon the contract. The parties have no power to resile where *res non est integra.*

Pars ejusdem negotii.—A part of the same business or transaction. Where an obligation is undertaken conditionally, it cannot be enforced until the condition be purified, nor can a defence founded on the failure of the condition be disregarded, because the obligation and the condition are *partes ejusdem negotii*, and must be considered together as forming the constituent parts of one transaction. In considering whether statements made by a party under a reference to his oath are intrinsic or extrinsic, it is of importance to ascertain whether such statements relate or do not relate to *partes negotii.* If they do, they must be regarded as intrinsic qualities of the oath, and binding in their effect on the party referring. Thus, if the pursuer of an action which has been brought for payment of goods alleged to have been furnished to the defender, refers the question at issue to the defender's oath, and he depones that he bought the goods at the price libelled and received them, but adds that he paid the price to the pursuer, such an addition is intrinsic, and must be received as part of the answer to the question referred; the sale and delivery of the goods, and the payment of their price being parts of the one transaction, namely, the contract of sale between the parties. But if the defender, instead of deponing that he paid

the price of the goods, depones that he does not owe the sum sued for because he holds a counter claim against the pursuer, such an addition is extrinsic to the matter referred, and must be set up by the defender *aliunde*, not by his oath on reference. The claim of compensation is not *pars ejusdem negotii* regarding which the reference was made, but part of another and totally different transaction.

Pars fundi.—Part of the ground or soil. All those things which are in the soil as well as those growing upon it, or immoveably fixed to it, are reckoned parts of the soil itself. Such, for example, are houses built upon the ground, trees, minerals, &c.; and these being regarded as parts of the soil descend to the heir and not to the executor. Farther, a conveyance of the land carries all these as parts thereof, although not specially mentioned. Industrial crops are not considered *partes fundi*, and therefore a conveyance of lands will not carry them; they belong to the sower.

Pars judicis.—The part or duty of the judge. This refers to the duty which the judge is bound by his office to perform, whether it has been urged upon him by any of the parties to a suit or not. Thus, if an action is raised for payment of a sum of money due *ob turpem causam*, as, for example, for the wages of prostitution, it is *pars judicis* to dismiss the action whether the defender has appeared to plead this defence or not. In like manner, a judge should refuse decree for those items of an account which are struck at by the Tippling Act, although the defender should not plead the statute, for the judge is bound to carry out the intention of the legislature in repressing an evil, the existence of which is considered as obnoxious to sound policy. Everything which a judge should do in his capacity as judge, and without reference to the pleas of parties in the suit before him is included in the phrase *pars judicis*.

Parte inaudita.—One party being unheard; a case argued upon the one side, but not on the other. "Ministers lawfully provided to benefices, are secured in the enjoyment of the tithes belonging to them, against all grants, made or to be made to their prejudice, even in parliament, *parte inaudita*;" (Ersk. B. 2, T. 10, § 11), that is, ministers cannot be deprived of their tithes even by an order of parliament, until they have

been heard in support of their right, or until an opportunity has been afforded them for being heard. Where a decree is pronounced against a defender *parte inaudita, i.e.*, without his appearing or being heard on his defence, he may be reponed at any time before implement of the decree.

Parte non comparente.—A party not having appeared. The effect of non-compearance in a civil suit after citation is the same, for the time, as a confession that the sum sued for is resting owing, and on this implied confession decree is pronounced against the defender. The defender may subsequently be reponed, and elide the presumption raised against him through his non-compearance by proponing a defence, which is not weakened by his previous absence. In criminal prosecutions the effect of non-compearance is different. It raises no presumption of guilt of the specific crime charged, and cannot warrant sentence being pronounced on account of that crime in the absence of the accused. Such absence, however, constitutes the crime of contempt of the Crown, and disloyalty, for which the accused undergoes the sentence of outlawry. See *Fatetur facinus, &c.*

Partes beneficii.—Parts of a benefice, or living. Stair, B. 2, T. 8, § 35.

Partes rei sunt favorabiliores.—The condition of a defender is more favourable (than that of the pursuer.) This arises from the fact that the law presumes the claim made upon a defender to be unfounded, until the pursuer has substantiated his claim as a just one. Accordingly the defender is not bound to prove his defence until the pursuer has made out his claim, for until then the legal presumption is altogether in favour of the defender. The same presumption holds, if possible, in a stronger degree in criminal prosecutions. The panel is presumed to be innocent until he has been proved guilty, and he is not bound to adduce a single witness tending to prove his innocence until the prosecutor has proved his guilt. If the prosecutor fails in establishing this, no matter how suspicious the circumstances may appear to be, the panel is entitled to an acquittal without any explanation from him regarding those circumstances.

Partes soli.—Parts of the ground or soil. See *Pars fundi.*

Particeps fraudis.—A partaker or partner in the fraud. One who has been a party to a fraudulent transaction can take

no benefit under it. Thus, if a bill has been obtained through fraud, that will form a valid defence to any action or diligence raised upon it by any one who was a partaker in the fraud. But if the bill has passed into the hands of a *bona fide* and onerous indorsee, the previous fraud, to which he was no party, will not affect his right to sue for and enforce payment of the sum contained in it. Again, if a creditor on the estate of an insolvent debtor, while appearing to the other creditors to accept of a composition upon his debt equally with them, should arrange with the debtor for full payment of his debt, such an arrangement being one in defraud of the other creditors, cannot be enforced by that creditor who participated in it; and in any action raised upon it, the plea that it proceeds upon a fraud may be successfully maintained, even by the debtor, who was himself equally involved in its perpetration.

Partus sequitur ventrem.—The offspring follows the mother. Accession is one of the modes in which property is acquired, and is either artificial or natural. Artificial accession is that addition to property which is the result of human skill and industry; while natural accession is that which human skill cannot produce, but which proceeds as the result of natural laws. The young of cattle is of the latter class, and belongs as an accessory to the owner of the mother at the time of the birth. The same rule applied, under the civil law, to the offspring of a female slave.

Pater est quem nuptiæ demonstrant.—He is the father whom the marriage indicates to be so. All children born in wedlock are presumed to be the legitimate children of the husband and wife, but this is a presumption which may be redargued. Formerly our law demanded, in order to overturn the presumption of legitimacy, a proof amounting to this, that it was physically impossible for the husband to be the father of the child, in respect either that he was impotent and incapable of procreation, or that he was absent from his wife, and could not possibly have had access to her during the period of gestation, which is fixed by law to be not more than ten nor less than six months before the birth. This rule of law has been considerably relaxed by the more recent decisions upon the point. It may now be regarded as settled, that the Court, in deciding whether the child born in wedlock is the child of

the husband, will take into consideration, not only such evidence as will tend, in consequence of the husband's impotency or absence, to prove that this is a physical impossibility, but also such evidence of the relative position of the parties, their habits of life and conduct, their statements regarding the point at issue, and, indeed, any competent evidence tending to induce a moral certainty that the child is not the issue of the spouses. (See Fraser's Dom. Rel. II. 2, and authorities there cited.) It is not sufficient, however, to overturn the presumption of legitimacy, that both husband and wife shall declare the child to be that of another than the husband, unless such declaration is corroborated *aliunde*, because it might be their interest at the time to make such a declaration, to the prejudice of the legal rights of the child as their own legitimate offspring. In such case the law constitutes itself the guardian of the child's rights, and requires the clearest evidence of its illegitimacy before declaring it to be so. This maxim has no application in the case of a child born out of wedlock, but whose alleged father subsequently married its mother. *Innes*, 7th July 1835.

Pater patriæ.—Father of the realm. "In default of tutors-legitim, there is place for tutors-dative; who were, by the Roman law, named by the magistrates, but with us by the King alone, as *pater patriæ*, in his Court of Exchequer." Ersk. B. 1, T. 7, § 8.

Paterna paternis.—Estate succeeded to through the father descends to the father's heirs. See *Materna &c.*

Patrem sequitur sua proles.—His offspring follows the father. This has reference only to the right of succession vested in children, who, if their father has not otherwise validly disposed of his property, are entitled to succeed to his estate to the exclusion of all others.

Patria potestas.—This was the name given to that power which, under the civil law, a paterfamilias had over all the members of his family; the family including his wife, children, and grandchildren, as well as those who became members of the family by marriage or adoption. At one time this power was very extensive, for under it the paterfamilias could sell, abandon, or put to death any member of his family; but subsequently it was much limited, and ultimately it gave the

paterfamilias scarcely any other right than that of demanding as his own any property which was acquired or succeeded to by a member of the family.

Patrimonio ejus abest.—That which is wanting from a person's estate. Any thing which belongs or is due to one person, which is abstracted or retained by another falls within this description. An article which has been stolen, a debt which is due, expenditure on behalf of another as by a mandatory or *negotiorum gestor* not reimbursed, are instances of what this phrase includes; they are all wanting, or absent from the creditor's estate, *i.e.*, his estate is *minus* their value or amount. See *Ei abest.*

Patronum faciunt, dos, ædificatio, fundus.—Endowment, building, the lands on which the church is built, constitute the patron. "There stood the like relation betwixt patrons and kirk's patronate, as betwixt patrons and libertines (freedmen), the ground whereof was an eminent good deed done by the patron or his predecessor to that kirk, especially those acknowledged in law, *patronum faciunt, dos, ædificatio, fundus;* signifying the building of the church, or giving of the stipend, or of the grounds necessary for the church, churchyard, manse or glebe, were the grounds for constituting the patronage, which were sufficiently instructed by the custom of the kirks, acknowledging such a patron." Stair, B. 2. T. 8, § 27.

Peculium.—Property. A wife's paraphernalia, as also that estate which she possesses as her own, exempt from the *jus mariti*, and from her husband's right of administration, is called her *peculium.* Bell gives this name to all property which by custom or special gift is appropriated to the wife, and that in regard to which the husband, while solvent, has renounced his marital rights. For an enumeration and explanation of the different *peculia* of the civil law, see *Bona castrensia, &c.*

Pendente lite.—During the dependence of the suit. Formerly, if one of the parties to a suit assaulted his opponent during the dependence of the suit, or was accessory to such assault, he was punished by the loss of his cause; but the statutes under which this penalty was inflicted were repealed by the Act 7 Geo. IV. cap. 19. Such an assault is now pun-

ished in the same way as any other assault; it has no effect on the decision of the suit.

Pendente lite nihil innovandum.—Nothing is to be changed during the dependence of a suit. When a subject once becomes litigious, *i.e.*, becomes the subject of judicial discussion, neither of the parties can affect or prejudice the other's rights by any act done by him in reference to the subject of the suit: all such acts are ineffectual in so far as his opponent is concerned. Thus, if a pursuer seeks reduction of a conveyance of lands executed by him in favour of the defender, the defender cannot avoid the consequences of the action by conveying the lands even onerously to another party. Such a conveyance will be ineffectual as in a question with the pursuer's rights, who, if he be successful in the reduction, will be entitled to recover the lands from the purchaser. This maxim "applies only to things done by the debtor or defender in the action, which tend to make the right of the creditor or pursuer worse, but cannot hinder the creditor or pursuer from making his right better, even in competition with another creditor or pursuer." *Massey*, 12 July 1785, M. 8377.

Pendente processu.—During the dependence of the process or suit. Stair, B. 4, T. 20, § 11.

Pendentes (fructus).—Hanging fruits; fruits still undetached from the tree. Such fruits must be restored along with the subject of which they are a part to the real owner, when he vindicates his right to the property as against a *bona fide* possessor. In this respect they differ from the fruits which have been gathered, although not yet consumed; these remain the property of the *bona fide* possessor.

Penuria peritorum.—A want or scarcity of skilled men. It is a question how far a conveyance of moveables, or a deed regulating moveable succession will be sustained when it is improbative or otherwise defective, on the ground that the granter could not obtain skilled assistance in its preparation and execution. In the case of *Crichton*, 12 Jan. 1802, M. 15952, where a testamentary deed, not holograph, and wanting the name of the writer and designation of the witnesses, was found ineffectual, it was observed from the Bench, that an improbative writing had never been sustained as a conveyance of moveable succession, unless where there had been a *penuria peri-*

torum, as in the case of military testaments made abroad. There does not seem, however, to be any case reported in which a defective or improbative writ was sustained upon that ground.

Penuria testium.—A scarcity of witnesses. Formerly, when persons were disqualified as witnesses on account of relationship and interest, it was customary nevertheless to admit their evidence where the circumstances of the case necessarily involved a scarcity of witnesses. Thus, in an action for separation and aliment at the instance of a wife on account of ill-treatment by her husband, their children were admitted to prove or negative the pursuer's averments, as without such admission it might have been impossible to prove the case. The same rule was followed in the case of occult and domestic crimes, where of necessity there was a *penuria testium*. This is now of no importance since disqualification of witnesses has been almost entirely abolished.

Per æs et libram.—By brass (or money) and scales. One of the modes of acquiring property under the civil law was *mancipatio*, which consisted in a certain ceremony representing a fictitious sale. Gaius (who takes the instance of the sale of a slave), describes this ceremony as follows: "*Mancipatio* is effected in the presence of not less than five witnesses, who must be Roman citizens and of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of brazen scales, and hence is called *Libripens*. The purchaser taking hold of the thing, says: I affirm that this slave is mine according to the Quiritian law, and he is purchased by me with this piece of money and brazen scales. He then strikes the scales with the piece of money, and gives it to the seller as a symbol of the price." (GAI. I. 119). This ceremony was required by the law for the transfer of the quiritarian ownership, but it was so far fictitious, that the real contract of sale consisted in the agreement of parties as to the price. The same ceremony was sometimes observed in making a will, where the testator received from the purchaser of the inheritance a piece of money as a symbol of the price; the purchaser being thereby constituted heir. Property or succession thus acquired, was said to be acquired *per æs et libram*.

Per ambages.—In a secret manner; or, by evasion. A father cannot by his *mortis causa* deed defeat his children's right to legitim, although he may affect the ultimate value of that right by gifts or other form of *inter vivos* conveyance. Nor can he defeat this right *per ambages*, as, for example, by the execution of a deed which, according to the tenor of the words used, may appear to be a deed *inter vivos*, while in reality, and as regards its effects, it is a deed *mortis causa*.

Per aversionem.—By bulk, or aggregate quantity. Sale *per aversionem* means the sale of a certain subject by the bulk, without any specific statement of its exact quantity, as, for example, all the corn in a certain granary, a certain crop, or all the wine in one's cellar.

Per capita.—According to the heads, or individuals. Where a testator provides that his estate is to be distributed among the beneficiaries *per capita*, it is divided into as many shares as there are persons called to the succession. In such a succession each individual succeeds in his own right, and the right of representation is excluded. See *In stirpes*.

Per collationem bonorum.—By collation of goods. Collation is a provision of our law by which the heir of a deceased person may, by resigning the heritage to which he has succeeded, claim an equal share of the whole succession of the deceased. It is the interest of the heir-at-law to collate, when the heritable estate of the ancestor is small and his executry great. The heir can never be compelled to collate, but, on the other hand, every heir has not this privilege, for to entitle him to the benefit of collation, it was formerly necessary that he should be of the next of kin to the deceased, and consequently one who would have participated in the moveable succession had he not been the heir in heritage. Some changes were however introduced into the law upon this point by the Act 18 Vic. cap. 23, which see.

Per equipollens.—By an equivalent. This is used as antithetical to the phrase *in forma specifica*. Where a specified form of action or expression is essential to render a certain act effectual, no equivalent, however intelligible or express, will supply the place of the prescribed form. Thus, prior to the passing of the Titles to Land Act, the word "dispone" was essential to every deed intended to operate as a conveyance of

heritage. No other word, or number of words, however clear their meaning,—such, for example, as "sell," "alienate," "convey," &c.—could supply its place. The word itself was essential, and could not be supplied *per equipollens*. Another illustration may be found in the case where the granter of a deed calls in witnesses to attest his subscription who have not seen him subscribe it. In such case it is essential to the validity of the deed that the granter shall, in the presence of the witnesses, declare the signature to be his. His declaration must be distinct, and have special reference to the signature. This declaration cannot be supplied *per equipollens*, such as requesting the witnesses to subscribe as such, that it is "all correct," that the deed (as in the case of a testator executing his settlement) embodies his wishes, or expresses his will, &c. He must declare that the signature is his in express terms, otherwise it will not be held to have been validly executed.

Per expressum.—Expressly; in direct terms.

Per incuriam.—Through negligence, mistake, or error.

Per membra curiæ.—By members of the Court. Ersk., B. 2, T. 5, § 81.

Per modum exceptionis.—By way of exception. Where an obligant claims exemption from fulfilment of his obligation, on the ground that it was extorted from him through force or fear, he may plead this ground of exemption in either of two ways; he may proceed by action for reduction of the obligation, or plead it by way of exception or defence in any action brought against him to enforce fulfilment. So also in the case of a bill which the alleged debtor in it avers to be a forgery; he may either reduce the bill upon that ground, or plead forgery by way of exception in the action, or under a suspension of the diligence raised upon it. The same course is open to one of the parties to a contract, where he has been induced to enter into it by fraud, or where it proceeds *ob turpem causam*. An exception (although the term is frequently used as synonymous with defence) is, properly speaking, only that kind of defence which admits the relevancy of the libel, and that the conclusion would be just if it were not elided by the exception pleaded.

Per modum gratiæ.—By way of favour; as an act of grace.

Per modum justitiæ.—By way of justice; as an act of justice to which one is entitled. "One who is restored to his estate *per modum justitiæ* against an attainder, either on account of its injustice, or of some legal nullity in the proceedings, recovers his whole estate, though the King should have made a grant of all or part of it over to a donatary, after the forfeiture; on the other hand, where one is restored to his estate *per modum gratiæ*, merely in the way of favour, the attainder is presumed to have been legal, and is accounted such in law; for which reason all grants of the forfeited estate made in consequence thereof by the Crown, in the intermediate period between the attainder and the restitution, must stand good." Ersk., B. 4, T. 4, § 107.

Per modum pœnæ.—By way of punishment or penalty. The oath *in litem* of a traveller as to the value of the property lost in an inn, and claimed by him from the innkeeper under the provisions of the edict *nautæ caupones, &c.*, is said to be allowed by way of punishment, as well as on account of its being the best evidence which, in the circumstances, can be adduced. An heir is liable for any sum in which his ancestor, whom he represents, has been found liable by judicial award, except where the award is pronounced by way of fine, on account of a delict committed by the ancestor; for such penalty the heir is not responsible. Nor is a husband liable for any fine imposed in like manner upon his wife. See *In modum*, &c.

Per modum simplicis querelæ.—By way of simple complaint. Erskine refers to this (B. 4, T. 4, § 68) as a mode in which an action of improbation, on the ground of forgery, may be brought before the Court of Session "without any summons, or by a formal summons of improbation," Such a form of proceeding has been altogether unknown in our practice for a very lengthened period.

Per rescriptum principis.—By a rescript or ordinance of the prince. Legitimation of illegitimate children was sometimes effected by an imperial rescript. Under the civil law such rescript was not granted by the Emperor, if the father had other legitimate offspring, or if marriage with the mother of the illegitimate children had become impossible by her death, or from any other cause. Where these objections could not be urged, the rescript might be obtained by the father, or even

by the children, if their father's testament declared it to be his wish that they should be legitimised. Such a mode of legitimation has been recognised in our law, and has been granted, even where legitimate offspring were still living. The effect of the Sovereign's rescript, however, was merely to confer upon the children the *status* of legitimacy; it did not entitle them to succeed to their father. The chief purpose for which such rescripts were obtained in Scotland, was to entitle the bastard, where he had no lawful children, to dispose of his heritage or moveables by will; but as the disability thus removed in each case by rescript has been entirely removed by statute, letters of legitimation from the Sovereign are now practically worthless, and in practice are unknown. The only mode of legitimation now practically known is that *per subsequens matrimonium*.

Per saltum.—Literally, by a leap; without intermediate steps. "Signatures and charters of the vassals of kirk lands, where their valuation does not exceed ten pounds Scots, pass by the great seal *per saltum*, without passing any other seal." (Ersk., B. 2, T. 5, § 83); charters of a different description were required first to pass the privy seal. An heir who makes up his title to an ancestor more remote than the one on whose failure he succeeds (as he may do for the purpose of avoiding representation), may be said, in thus passing over his nearer ancestors, to make up his title *per saltum* to the ancestor more remote.

Per se.—By himself, or itself.

Per stirpes.—According to the stocks. Succession *per stirpes* is succession by right of representation, where the estate is divided, not according to the number of persons who take benefit therein, but according to the number of persons called to the succession, and through whom the others (for example, their lawful issue) take their right. See *In stirpes*.

Per subsequens matrimonium.—By subsequent marriage. Children who, at their birth, were illegitimate, become legitimate by the subsequent marriage of their parents. This rule is borrowed from the civil law, where it was introduced by the Emperor Constantine after his conversion to christianity, with the view of checking the general depravity of manners which the Roman law of marriage was calculated to produce.

To render this mode of legitimation effectual, it is essential that the parents should have been under no legal impediment to marry at the date of the procreation of the child or children, and consequently children born of an adulterous intercourse are not legitimated by the subsequent marriage of their parents. It was at one time questioned whether legitimation *per subsequens matrimonium* was barred by the intermediate marriage of either of the parties with another than the parent of the child, but it was decided, according to the opinions of a majority of the whole Court, that such intermediate marriage did not bar legitimation. The reader may consult, with much profit, the very instructive case of *Kerr*, 6th March 1840, where this was decided, and in which the whole authorities on this part of our law are quoted and commented upon. In the same case it was incidentally questioned, whether a son thus legitimated would succeed, by right of primogeniture, to his father's estate, to the exclusion of a son born of the intervening marriage; and although the point was not decided, the opinions given were to the effect that he would not. A son, however, who is legitimated, succeeds by right of primogeniture, to the exclusion of those children born after the subsequent marriage of his parents.

Per tacitam reconventionem.—By a tacit renewal of the bargain or contract. Stair, B. 1, T. 6, § 36.

Per tacitam relocationem.—By tacit relocation. Tacit relocation is the implied reletting of a subject, or renewal of a lease, inferred where a landlord, instead of warning his tenant to remove, allows him to remain in possession after the stipulated term of the lease has expired. Parties are then presumed to have entered upon a new lease, upon the same conditions as the former one. Tacit relocation is also understood to take place between master and servant, when the parties allow the term of the original engagement to expire without giving the legal warning that the engagement is then to be at an end; but in any case, for however long a period the original lease may have been granted, or term of service agreed upon, tacit relocation has only the effect of binding the parties for a year, and it may be put an end to by either of the parties giving the required warning. Where the original term of service has been for a shorter period than a year, tacit relocation will only re-

new the contract for a period equal to that for which it was originally entered into; thus the contract of a monthly servant will only be renewed for a month by tacit relocation.

Per universitatem.—Regarded as a whole; in its entirety. Stair, in treating of vicious intromission, and of the extent to which this must be carried in order to render the intromitter liable, says: "The intromission must be universal; not that the intromitter must meddle with all the defunct's moveables, but must meddle *quasi per universitatem*, because heritage is *per universitatem:* as he that meddles with a flock of sheep meddles *per universitatem;* yet many of the flock may be meddled with by others, but what remains being still the flock, he is only said to meddle with the flock. And so intromission with one thing, or some small thing, will not infer this passive title." B. 3, T. 9, § 7.

Per venditionis, donationis, cessionis, vel commutationis titulum.—By the title of sale, donation, cession (assignation), or barter. These terms were used in the older forms of conveyancing, to distinguish lands so acquired from lands acquired either by inheritance or feudal grant. They signify what is now known by the name of a singular title. All persons are now regarded as singular successors in lands, who have acquired them by purchase or gift, or in any other character than that of heir.

Percepti sed non consumpti.—Fruits gathered, but not consumed. See *Possessor*, &c.

Perceptio.—A gathering in, collecting, appropriation. A *bona fide* possessor of lands makes the fruits thereof his own by gathering them, and for these he is not accountable to the real owner, whether they have been consumed or not. The fruits which have not been gathered, but are still *pendentes*, remain the property of the true owner.

Peremptoria litis et causæ.—Decisive of the suit and cause. Defences are either peremptory or dilatory. The latter (now more generally called *preliminary* defences), are those which only affect the particular case or process in which they are pleaded, without affecting the pursuer's right on the merits. Such, for example, is any plea founded on informality in the summons, or irregularity in the citation; and the effect of any dilatory plea, if sustained, is merely to throw that suit out of Court, without prejudice to the pursuer's right to raise and

insist in another action regarding the same subject matter. A peremptory defence, on the other hand, as its name imports, is decisive of the question at issue between the parties, when it has been sustained. Thus, if an action, proceeding on the ground that the defender is resting owing the sum sued for, be met with the defence of payment, that is a peremptory defence, which, if sustained, has the effect, not merely of dismissing the action, but of assoilzieing the defender, and settling that question between the parties for ever. The pleas of compensation, *res judicata*, prescription, &c., may be given as farther illustrations of peremptory defences. Peremptory defences may be briefly defined as those which enter into and affect the merits of the case, while dilatory or preliminary defences are those which (most frequently relating to matters of form) do not affect the merits, but some other point to be discussed before the merits of the question at issue are enquired into or discussed.

Perficere susceptum munus.—To perform the duties of an office undertaken. Any one who voluntarily undertakes a certain duty, or accepts of a certain office, cannot of his own will resign it, but must perform all the duties incumbent on him in respect of it. Thus, an arbiter having once accepted of the office, must proceed in the submission until he has pronounced his final award; a mandatory must perform that which, by the mandate he has accepted and acted under, he has been authorised and empowered to do; and so also with a *negotiorum gestor*, testamentary trustees (unless entitled to resign their office under the special provisions of the testator's settlement), tutors and curators, &c. In some of these cases the Court will relieve the party of his office and its duties, as in the case of a tutor or curator in whose favour some interest has emerged adverse to the interest of the ward; but the parties cannot of themselves capriciously resign an office of which they voluntarily accepted, until its duties have been performed and its purpose or object attained. See *Id quod prius*, &c.

Periculo petentis.—At the risk of the person seeking. All judicial warrants obtained at the instance of a private suitor are granted at his risk. Thus, an interdict to prevent the sale of goods is granted to the petitioner entirely at his risk, for it is he who alone can be made liable in the conse-

quences of its use, should the party interdicted thereafter show that the application was groundless, and claim damages on account of any loss sustained by him in consequence of the interdict. The judge granting the warrant is not liable for its consequences, however disastrous they may be. In like manner a creditor seeking a warrant for the apprehension of his debtor obtains it *periculo petentis*, and he, not the judge, will be liable in damages if the debtor can show that the obtaining of the warrant and the using of it were illegal.

Periculum.—Risk, danger, peril.

Periculum rei venditæ nondum traditæ est emptoris.—The risk of a subject sold, but not yet delivered, lies with the purchaser. The risk referred to in this maxim, is that material risk, inherent to the subject, of deterioration or loss by fire, shipwreck, decay, &c. Previous to the passing of the Mercantile Amendment Act, the purchaser of a subject still undelivered, underlay any risk (although this is a risk of a different character from the *periculum* of the phrase) which might arise from the bankruptcy of the seller, or the diligence of his creditors. Until then, a subject sold but not delivered, was regarded in a question with the seller's creditors, as the property of the seller; and, accordingly, if the seller became bankrupt before delivery was made, the buyer could only rank on his estate for the price paid, as for an ordinary debt. The subject could farther be attached by the seller's creditors before delivery, as until then the right of property in the subject did not pass to the buyer; but the rules of law on this point have been considerably altered and modified by the provisions of the Mercantile Amendment Act.

Perimere causam.—To put an end to, or exhaust the cause. This is the effect of a peremptory defence when sustained, for it not only frees the defender from the particular suit in which the plea is urged, but totally extinguishes the pursuer's right of action upon that claim; it constitutes a *res judicata* between the parties on the point at issue. A dilatory or preliminary defence has only the effect of throwing out of Court the particular case in which it has been set up, without prejudicing the pursuer's right to bring a new action. See *Peremptoria, &c.*

Persona dignior.—The more worthy person; the more

fitting or suitable person. Where an heritable right is conceived in favour of a husband and wife in conjunct fee and liferent and their heirs in fee, the general rule is to regard the husband, being the *persona dignior*, as the sole fiar. This rule, however, is not absolute, but is subject to several limitations, arising from the intention of the parties from whom the right flowed, presumed from the special circumstances of each case. Concerning these limitations see *Cujus hæredibus*, &c.

Persona illustris.—A person of noble birth, or position. Stair, B. 1, T. 4, § 16.

Persona prædilecta.—A person chiefly favoured, or preferred. This phrase, which is very rarely used, signifies one person who, among others appointed with him as colleagues in some office, enjoys the confidence and esteem of the person appointing, more than those appointed with him. Thus, a testator not unfrequently appoints among his trustees one who shall be a *sine quo non*—that is, one whose concurrence and consent shall be indispensable to every act of administration under the trust. Such a trustee falls within the description of a *persona prædilecta*.

Persona standi in judicio.—A person or character entitling one to appear in a law suit to vindicate his right, and that whether in the character of pursuer or defender. This right is common to all, except those who have been deprived of it by the operation of the law, or those who have never yet attained it. Thus, a rebel who is civilly dead and deprived on account of his crime of all his legal privileges, has no *persona standi*, and can neither sue nor defend action so long as his legal disability remains unremoved. Nor can a pupil exercise this right, as the law does not confer it upon him until he has attained minority, on account of his presumed inability, through non-age, to exercise it discreetly or to his advantage. The distinction between *persona standi*, and *title to sue*, must be borne in mind; the former refers to the right which a party has generally to sue or defend action, while the latter refers to the legal interest which a party has to pursue any particular action.

Personæ miserabiles.—Poor or destitute people; such as widows, orphans, paupers, &c. Ersk. B. 1, T. 5, § 30.

Personali exceptione.—By personal exception. A per-

sonal exception is one founded upon reasons strictly personal to the party against whom it is urged, and arising from some act or omission of his own. Thus, if the indorsee of a bill gives the acceptor time to make payment of the contents beyond the day on which it falls due, in the knowledge and with the consent of the drawer, the drawer cannot afterwards claim exemption from his liability to the indorsee on account of the want of due negotiation. He is barred by personal exception from maintaining any plea on that ground in respect of his consent having been given to the delay. Yet, such a plea might be effectual if maintained by a prior indorsee who was no party to the arrangement under which the delay was granted. A superior is barred by personal exception from claiming non-entry duties from a vassal's disponee, when the non-entry arises from his own fault, as, for example, where he has not made up his title to the superiority. A personal exception, thus, as its name implies, is one that can only be pleaded as against the particular person, and is founded upon some act of his own; whereas other exceptions, such, for example, as that a bill is forged, may be maintained against any one, however guiltless of the forgery, who holds or does diligence upon the bill.

Personali objectione.—By personal objection. Some persons are rendered incapable of holding certain offices by reason of personal objection. Thus, it will be sufficient to exclude one from the office of trustee on a sequestrated estate that he is already trustee upon another estate, the interests of which are conflicting with those of the former. So, also, a candidate for the office of trustee on a sequestrated estate was held ineligible for that office on the ground of personal objection, because he held a commission to act as an occasional sheriff-clerk depute, in that county, to the sheriff of which the sequestrations proceedings fell to be remitted. *Clark*, 18th Nov. 1847, 10 D. 117.

Pessima fides.—The worst faith; amounting to a moral dishonesty.

Pignus.—A pledge; the contract of pledge. This was one of the real contracts of the civil law, which could only be constituted by the delivery of the subject pledged. It gives rise to the actions *directa* and *contraria*, the former at the

instance of the pledger for delivery of the pledge when his debt has been paid, or obligation fulfilled; the latter, at the instance of the pledgee for recovery of any expenses necessarily disbursed by him for the maintenance or preservation of the pledge. The pledgee cannot be compelled to give up the pledge until that claim, in security for which he holds it, has been satisfied; if he does part with its possession, his right over it ceases.

Pignus prætorium.—A legal pledge; a pledge given by the law or the magistrate who administers it. The right vested in a creditor by adjudication is an illustration of the prætorian pledge. The adjudication does not vest the creditor with an absolute title to the heritage of his debtor, but merely gives him a right which may be defeated by the debtor's making payment of his debt, for the debtor may redeem his lands by payment of his debt at any time before declarator of the expiry of the legal: otherwise, the right of the creditor is indefeasible. The right thus vested is really a right of pledge, because the creditor at first only holds the lands in security of the fulfilment of the debtor's obligation, and it is *prætorium* because it is granted by force of law, and not voluntarily by the debtor.

Placuit regi et concilio suo.—It has pleased the king and his council. Ersk. B. 1, T. 1, § 38.

Plebiscitum.—A law passed in the general council of the Roman people on the motion of a plebeian magistrate, *i.e.*, a tribune. Originally such laws were not binding upon the patricians, but only on the plebeians, and hence their name. At a later period, however, (B. C. 286), they were made binding on all Roman citizens; and the *plebiscita* formed one of the chief portions of the written law of Rome.

Pleno jure.—With full right. A conveyance or presentation *pleno jure* carries the full right with the profits or advantages pertaining to it.

Plenum dominium.—The full right of property; an unrestricted fee.

Pluris petitio.—A claim for more than is due. Where a creditor claims judicially from his debtor more than is due, the only effect of such a proceeding is to modify the claim for expenses, which he would otherwise have had. It does not

affect his right to obtain decree under that action for the sum really due him. It is not considered a *pluris petitio*, where a pursuer in an action of damages claims a much larger sum than that which is ultimately awarded him, for in such cases the sum libelled is generally a random sum, sufficient to cover any award which a jury may pronounce. Where an adjudging creditor leads his adjudication for a larger sum than is due him, such *pluris petitio*, if it be material, will have the effect of annulling the adjudication; where it is slighter, its effect is only to reduce the adjudication to a security for principal and interest, without expenses or penalties.

Plus enim valet quod agitur, quam quod simulate concipitur.—That which is done is of more avail than that which is pretended to be done. Thus, a donation between a husband and a wife, although clothed in some other form, such as a right in trust conveyed to a third party, may be revoked, for the law regards the real character of the transaction rather than the form in which it is transacted. So also a donation *mortis causa*, in whatever form of words it may be expressed, if its real character be plain, is revocable at any time by the granter. On the same principle, one who has disponed his lands by an *ex facie* absolute disposition to a creditor, is entitled to insist on a reconveyance, if the disposition granted by him was really one in security; the real transaction being, when proved, more regarded than the simulate form in which it is clothed.

Plus petendo tempore.—When a creditor pursues for payment of a debt due him before the time at which he is entitled to demand or sue for it, he is said to be seeking his debt *plus petendo tempore*. This takes place, for example, when a creditor, who agreed to give his debtor six months' credit, sues for payment at the end of three, or at any time before the agreed on term of credit expires; so also, in the case where the creditor of a person deceased sues the executor before the expiry of the six months allowed to an executor to realise the estate. In such a case the pursuer renders himself liable in the expenses of the defence. See *Pactum de non petendo*.

Plus quam tolerabile.—More than can be borne or endured. A farm tenant is entitled, in certain cases, to an abatement of rent, where his crops have suffered extraordinary damage,—

extraordinary, both in extent and in the cause from whence the damage arises. "Though the tenant should have got possession, and sown his arable grounds, the landlord cannot, by the Roman law, claim any part of the rent of that year, if inundation, the calamity of war, the corruption of the air, or the inclemency of the weather, by earthquakes, lightning, &c., hath brought upon the crop a damage *plus quam tolerabile;* but if the loss be more moderate, he may exact the full rent." "These rules have been adopted into the law of Scotland, not only in the opinion of writers, but by our decisions, so far as they have gone in that matter." The risk of the seasons is, however, one of the risks undertaken by the tenant, and therefore it must be an event of such a character as cannot reasonably be supposed to have been contemplated by either of the parties to the lease, or to have entered into their calculations, which alone can warrant the tenant's claim for abatement. Regarding the law on this point, the reader may consult Ersk., B. 2, T. 6, § 41 (from which the above extract is taken), and Bell's Prin., § 1208, with the authorities there cited.

Pœna ordinaria.—Ordinary or usual punishments. In some cases the punishment inflicted upon a criminal for the commission of certain crimes is fixed and determined, and in no respect within the discretion of the judge; such, for example, as those in which a prisoner has been found guilty of murder, treason, &c. There are others in which, while the judge has a certain discretion, this is limited to the extent or duration of the punishment, and not to the nature of the sentence. Thus, where a prisoner has been several times punished for theft by imprisonment, the judge is required to pronounce a sentence of penal servitude, although it lies entirely with him to fix the period during which this is to be endured. These are instances of the *pœna ordinaria*, the usual punishments attached to certain crimes. But there is another class of punishments, the *pœna extraordinaria*, which are unusual, and regulated by no fixed rule; such, for example, as the punishment for contempt of Court, breach of sequestration or interdict, &c.; and in these the punishment is entirely in the discretion of the judge, who may either pronounce on the offender a sentence of imprisonment, inflict a fine, or dismiss him with

an admonition. In a word, the *ordinaria* are those imposed according to a recognised and fixed rule, while the *extraordinaria* are not regulated by any determined rule, but lie in the power and discretion of the judge.

Pondere, numero, et mensura.—By weight, number, and measure. These are the tests proposed by our law, by which to ascertain whether a certain subject falls within that class of subjects known as fungibles, which class includes all those things which perish in the using, and which can be estimated generally by weight, number, and measure; such, for example, are corn, wine, money, &c. Fungibles may be given in mutuum, because there the borrower is not bound to return the identical subject borrowed, but its equivalent in quantity and value; but as fungibles perish in the using, they cannot form the subject of commodate, or of a contract of hiring, for in both these contracts the *ipsum corpus*, borrowed or hired, must be returned to the owner. Fungibles are so called, because they are things which are able to be replaced.

Popularis.—Popular; of or belonging to the people. Certain rights among the Romans were called popular, because they could be exercised by any citizen. Such was the right to demand the exhibition or production of a freeman unjustly imprisoned or detained by another, or demand the removal of a tutor *suspectus*: and the actions by which these rights were enforced were termed *actiones populares*. See *Actio*.

Portio Falcidia.—The Falcidian portion; which was a fourth of the whole estate of a testator reserved to the heir, and of which the testator could not otherwise dispose, deriving its name from the law which conferred this benefit upon the heir. See *Quarta Falcidia*.

Portionibus hæreditariis.—In hereditary portions; those portions which descend to heirs-portioners. Ersk., B. 3, T. 8, § 50.

Posse comitatus.—The power or force (the constabulary, &c.) of the county, which the Sheriff has a right to call out for the enforcement of legal diligence.

Possessio bona fide.—Possession in good faith. A person is said to possess a subject in good faith, when he possesses it in the belief that he does so honestly, that he is entitled to do so, and is ignorant that any other has a better title to it than

himself. Such a possessor is entitled to all the fruits of the subject which he has gathered, whether they are consumed or not. This kind of possession is contradistinguished from,

Possessio mala fide.—Possession in bad faith; which takes place when one holds possession of a subject, in the knowledge that another is the true proprietor, and that he himself has no good title thereto. Such a possessor is liable to the true owner, not only for the whole fruits yielded by the subject, but for those which it might have yielded, known technically as violent profits. It is often a difficult question to decide at what period of his possession the good faith of the possessor ceased. If the title of the claimant be obviously a good one, and that of the possessor obviously defective, the execution of the summons, to try the validity of the latter title, will, in the general case, be sufficient to place the possessor *in mala fide;* but the solution of this question will depend upon the particular circumstances of each case. See *Bona fide possessor*, &c.

Possessor in bona fide fecit fructus perceptos et consumptos suos.—A possessor in good faith makes those fruits his own which he has gathered and consumed. See the observations on the two preceding phrases.

Possidere.—To possess; in the sense of being proprietor, and not merely custodier. The latter kind of possession is signified by the terms *in possessione esse.* See *Aliud est*, &c.

Post causam cognitam.—After the case has been made known; after the grounds of action have been enquired into. See *Causa cognita.*

Post contractum debitum.—After debt has been contracted. An heir incurs a passive title inferring liability to a certain extent for his ancestor's debts, when he accepts gratuitously during his ancestor's life, a right to an heritable estate to which he would have succeeded on his ancestor's death. His title to the lands is said to be granted *post contractum debitum*, and it renders him liable for debts contracted by the ancestor prior to the date of the gift. See *Præceptio*, &c.

Post litem motam.—After the action has been raised, or moved in. After this has been done, neither of the parties can perform any act effectually whereby the interests of the other in the subject matter of the action can be affected. Thus,

if an action of reduction of a deed has been raised, on the ground of any informality or defect in it, the subsequent rectification of the error, or supplying of the defect, will not take away the grounds of action; the deed will be regarded as it stood at the time when it became the subject of the suit. See *Pendente lite*, &c.

Post tantum tempus.—After so long a time.

Posteriora derogant prioribus.—Subsequent (enactments) repeal prior ones. Any statutory enactment inconsistent with, or opposed to, one which has preceded it, operates as a repeal of the latter, although this should not be expressly embodied in the former. So also a subsequent clause in the same statute will operate as a repeal of a preceding clause, to the terms of which it is opposed. A pure case of the latter illustration seldom, if ever, happens; but where a subsequent clause differs from a preceding one, the latter will always be interpreted so as to make it agree with the provisions of the former.

Potestas gladii.—The power of the sword; that is, the power of judging in cases, the verdict in which may involve a sentence of death upon the panel. With us this power is vested exclusively in the Judges of the High Court of Justiciary.

Potestas maritalis.—The marital power; the power vested in the husband by virtue of the marriage. This power so vested in the husband extends alike over the person and estate of his wife, although, as regards the latter, his power may, before marriage, or after marriage with his consent, be restricted or entirely excluded. As regards the person of his wife, the husband's curatorial power is so complete, that the wife, in the eye of the law, loses her distinct *persona* altogether. She cannot act by or for herself; all her acts and deeds to her own or her husband's prejudice are ineffectual without his consent. He cannot be deprived of her society on account of any civil obligation she may have come under, even before marriage; so if, at the time of the marriage, the wife should be engaged in service, the husband is entitled to take her away from her master's house, and the latter cannot compel her to remain, although he may have an action against the husband on account of breach of contract. Neither can the wife's person be attached on diligence for civil debt. Over the

wife's moveable estate the husband's power is equally extensive, where it has not been conventionally restricted or excluded. All the moveable property of which a wife is possessed becomes, on her marriage, the property of her husband, and in him lies the full right to administer or dispose of it. In this is included the rents of lands, interest of money heritably secured, &c.; but that which is considered heritable in our law does not pass to the husband *jure mariti:* "As the society (marriage) entered into is to last no longer than the joint lives of the partners, rights that have a perpetual duration, and may be transmitted from one generation to another without perishing in the use (which our law styles heritable), are not brought under the partnership; *ex. gr.*, a land-estate, a tenement of houses, a right of tithes." Ersk., B. 1, T. 6, § 12.

Potior est conditio masculi.—The condition of the male (*i.e.*, husband) is stronger. This maxim has application in questions arising out of destinations of joint fee and liferent. Thus, where a subject is disponed to husband and wife in liferent, and their heirs in fee, the "heirs" are understood to mean the husband's heirs, because his position is considered the stronger or more preferable. The only exception to this rule is where the subject descends through the wife, or from her relations, in which case such a general destination as the one supposed would be held as conferring the fee upon the wife's heirs, or upon the wife herself, if her right was not specially limited to a liferent. See *Cujus hæredibus*, &c.

Potior est conditio possidentis vel defendentis.—The condition of a possessor, or of a defender, is stronger; *i.e.*, stronger than the condition or position of the person challenging the possession, or sueing. See *Melior est conditio*, &c.

Præceptio hæreditatis.—A taking of the inheritance in advance; receiving the inheritance before the ancestor's death. This is one of the passive titles known in law, which, if incurred by the heir, renders him in some measure liable for his ancestor's debts. It was introduced to prevent an heir from receiving and enjoying, under a gratuitous disposition *inter vivos* from his ancestor, that estate to which he would be entitled to succeed on the ancestor's death, and of thus avoiding responsibility for his ancestor's debts, and other obligations. Accordingly, any heir incurring this passive title renders him-

self liable for those debts contracted by his ancestor prior to the date of the ancestor's conveyance; and this liability transmits against the heir's representatives, if, after taking possession, he should predecease the ancestor. To incur this passive title it is necessary that, as regards the subject received, the person receiving it should be heir *alioqui successurus*, and that the conveyance be gratuitous: the *onus* of proving that it was onerous lying upon the heir. If the heir prove that he has paid money for the right conveyed, it will always be a question for consideration, whether the sum paid bears any adequate proportion in value to the subject conveyed; if not, the conveyance will be held to be gratuitous, for the heir is presumed to have paid that sum *dicis causa*, in order to avoid incurring this passive title.

Præcipuum.—A part of an estate which is not subject to the rules regulating its division, and which is paid or given over before division is made. This name is generally applied to that portion of the ancestor's estate which is allotted to the eldest heir-portioner, in addition to that share which she receives equally with the other heirs-portioners. It consists of titles of honour, the mansion-house on the family estate with the garden and orchard attached to it, heirship moveables, &c., and these she takes as her *præcipuum*, without giving any compensation therefor to the other heirs. She has also the right to such subjects as are indivisible, such as rights of superiority, the ancestor's town residence, &c.; but for these she requires to give compensation. The reader will find the word *præcipuum* used in reference to a different right than that of the eldest heir-portioner in Ersk., B. 3, T. 3, § 58; but it needs no farther illustration than that given in the text. It may be observed, however, that the word is now rarely, if ever, used to signify anything other than the heirs-portioner's right above explained.

Prædium.—Land; real property. This word signifies real property, whether it consist in lands or house property. All servitudes affecting real property are called prædial, and these are divided into rural and urban: the former includes all servitudes connected with the soil, such as a right of way, the right of conveying and drawing water, of pasturage, &c.; while the latter includes all those which have a necessary

connection with buildings, such as stillicide, *oneris ferendi* (the right of having one's building supported by that of a neighbour), *altius non tollendi* (of not building above a certain height), &c.

Prædium urbanum.—An urban tenement. This phrase is also used in the civil law writers to signify any building, whether it be within a town or not, in contradistinction to *prædium rusticum*, which signifies the soil. Just. Inst. B. 2, T. 3, § 1.

Præmatura diligentia.—Premature diligence. Stair, B. 3, T. 5, § 22.

Præposita negotiis vel rebus domesticis.—Set over domestic affairs. A wife is presumed from her position to be invested with this *præpositura*, and therefore binds her husband for the price of anything she may purchase which might be necessary for the family. It affords the husband no defence to a claim thus arising that his wife used the articles so purchased otherwise than for the benefit of the family, or that he gave her the money to pay for them; tradesmen and others being entitled to rely upon the presumed *præpositura* of the wife in their dealings with her. Where the wife incurs obligations in a manner not strictly falling within her presumed office, such, as for example, by borrowing money, it lies upon the creditor to show that the money was expended upon necessary furnishings, and that it was *in rem versum* of the family. This presumed right on the part of the wife to bind her husband in domestic matters, ceases if she abandons her family, or if her husband has put an end to it by inhibition.

Præpositor.—A person who deputes the management of his business to another; one who confers on another the *præpositura*. The person who receives the delegated authority, is called *institor* or *exercitor*.

Præpositura.—The office conferred by a principal on his factor, agent, or servant, under which the latter is authorised to carry on the business of the former, and in respect of which the servant by his acts binds the master in performance of the obligations undertaken in the course of the management of the business entrused to him.

Præpositus negotiis.—Placed over one's business; entrusted with the charge of certain affairs. The acts and deeds

of any one vested with the *præpositura*, if within the nature of the office so conferred upon him, are binding upon the *præpositor* or principal. Thus, a master, who entrusts to his servant the charge of a certain business, is liable for the obligations incurred by that servant in carrying it on, even where the servant has been unfaithful to his trust; a clerk, who has authority to draw and indorse bills in his master's name, binds the master by such transactions, even where he has embezzled the proceeds of the bills negotiated, and absconded; and a factor or agent binds his principal, if he acts within the terms of his mandate, although he should so act in defraud of his principal. To bind the alleged *præpositor* in any such case, it must be clear that the acts of the servant were authorised, and this may be proved either by the express terms of the servant's mandatory, or by the acknowledgment or homologation on the part of the master, of similar acts of administration and management on the part of the servant.

Præpositus negotiis societatis.—Placed over the affairs or business of the partnership.

Præscriptio fori.—An exception to the competency of the Court; a declinature of the jurisdiction. *Præscriptio* was originally a kind of defence, and derived its name from the position it occupied in the *formula* sent by the Praetor to the *judex* who was to try the case. It was written at the head or outset of the *formula*, and the object of it was to prevent the *judex* inquiring farther into the case if the *præscriptio* was proved. The difference between this kind of defence and the *exceptio* was this; the *præscriptio* (which stood at the head of the *formula*) put an end to the case at once, if the statements upon which it rested were true; the *exceptio* (stated in the body of the *formula*) made it requisite to go into the whole matter, in order to see whether there had been fraud, force, &c. As the *præscriptio* was generally founded upon alleged possession for such a length of time as took away the pursuer's right to claim, it ultimately came to signify, as it does now with us, the right which such lengthened possession conferred.

Præscriptis verbis.—In the words above written. The *formula*, under the civil law, sent by the Prætor to the *judex* appointed to try the question at issue between two suitors, set

out with a statement of the contract under which the respective rights and obligations of the parties arose. Thus, in the example of the *formula* already given (see *Judices dati*), the contract between the parties was one of sale. The first question to be decided by the *judex* was, whether the contract thus specified had been entered into, and if the facts proved in the course of the investigation did not amount to the constitution of the specified contract, the pursuer was cast in his suit. This rendered it necessary to have an action which would apply to those cases where parties had entered into an innominate contract, that is, into one of those agreements which, while valid as regards the parties, were not known by a special name, and where, consequently, the contract could not be set forth as in the ordinary case. The action provided to meet this want was called the action *præscriptis verbis*, because the formula directed the *judex* to decide for the pursuer, if the circumstances set forth in the words at the head of the formula were proved.

Præsentibus post proximum terminum minime valituris—These presents being of no avail after next term. Formerly, when an heir was served in general or in special to his ancestor in lands held of the Crown, the next step in making up his title was to obtain a precept from Chancery for his infeftment, proceeding on the narrative of the retour of his service. The effect of this precept was limited to the term of Whitsunday or Martinmas following its date by the words of the phrase. The form of procedure now to be adopted in making up a title by service is regulated by the Act 10 and 11 Vict., cap. 47.

Præstatio culpa levis—An obligation or liability for the middle degree of diligence; *i.e.*, for the diligence and care which a man of ordinary prudence is accustomed to bestow upon his own affairs. See *Culpa*.

Præter dotem—Over and above the dowry or tocher. Ersk., B. 1, T. 6, § 15.

Prævento termino—By anticipating the term. This name was given to a form of action formerly in use but now unknown in the Court of Session, adopted by a charger against whom a bill of suspension had been presented, in order to force on a discussion of the reasons of suspension. The object of the suspender being, not unfrequently, to occasion

delay, and thus postpone the payment of his debt, it was his interest to get a distant day of compearance assigned in the deliverance on the bill of suspension. As, by the forms of Court, the charger could not insist on having the reasons of suspension discussed until the day on which, by the letters of suspension, he was cited to compear, he was allowed to bring an action for shortening the term or *inducice*, and this was therefore called an action *prævento termino*. The present forms of procedure in the Bill Chamber have superseded the necessity for such an action.

Precarium.—A species of the contract of commodate, where the subject is lent, not for a certain time or for a special occasion, but during the pleasure and at the will of the lender. In the civil law *precarium* included every thing which one had obtained or extorted from another by prayers and entreaties (*preces*). The person from whom the possession had been thus extorted could resume possession at any time under the interdict *de precario;* and hence the word *precarius* came to mean uncertain.

Preceptum amissionis superioritatis.—A precept of a lost superiority. A disponee is sometimes unable to complete his right to the lands which he has acquired through the refusal or inability of the superior to give him an entry. In such a case the disponee formerly charged the superior to enter him, or, (where this was necessary,) to make up his title to the superiority and enter him. On the superior's failure to make up his title or enter as charged, the disponee brought an action of declarator of tinsel of the superiority, in which he called the next superior or over-lord as a party, in order that he might be authorised and ordained to receive the disponee as his own immediate vassal. Where the mediate superior was the Crown, a precept was issued from Chancery on the decree of tinsel, for the infeftment of the disponee, infeftment on which made his title as complete as it would have been had he been infeft on a charter of resignation from his immediate superior. This precept was called the *preceptum amissionis superioritatis*, because its effect was to deprive the superior of his right to the casualties during that vassal's life, although it did not affect his right to the yearly duties. A simpler and

more expeditious mode of compelling an entry was introduced by the Act 10 and 11 Vict., cap. 48.

Prescriptio longissimi temporis.—The prescription of the longest period. With us the prescription of the longest period is the prescription of forty years, which has the effect of discharging a debt not sued for within it, &c.; and this is generally known as the long prescription, in contradistinction to others of a shorter period. Among the Romans the prescription signified by the words of the phrase was of a different character. It was either of a period of thirty or forty years. 1. By possession for the former period, the property of a subject stolen was transferred to the possessor, if his possession began in *bona fide;* and even in the case of the thief himself, the lapse of thirty years gave him a valid defence to any action for recovery at the instance of the true owner. The difference in the case of a person possessing *in bona fide*, and of one possessing *in mala fide*, was this, that the latter was only protected by the prescription so long as he retained possession, for if he lost possession he had no action for recovery; this lay with the true owner: while the former, by the lapse of the prescriptive period, became the true owner, and enjoyed all the rights attaching to ownership. In short, where there was *bona fides* the prescription transferred the property; where there was *mala fides* it only afforded an exception to any action for recovery. 2. The forty years' prescription was the same as that of thirty years, with this exception, that it applied only when the property in question belonged to the state, the church, or to a pupil. The Romans had also the prescription *longi temporis*, which applied to immoveable or real rights. Its period was ten years, *inter presentes, i.e.,* where the party possessing, and the party challenging, the possession, lived in the same province, and twenty years *inter absentes, i. e.,* where they lived in different provinces.

Presumendum est pro libertate.—The presumption is in favour of liberty. Any restriction upon the full and unrestrained enjoyment of property, or in the exercise of the rights of ownership which attach to it, are regarded unfavourably by the law, the legal presumption being, as expressed in the words of the phrase, in favour of the free and unlimited exercise of these rights; and therefore all such restrictions are

disregarded where not clearly imposed, and even then are interpreted *stricti juris*. Accordingly, rights of servitude, being burdens and restrictions of the nature referred to, are strictly construed; so also are the restrictive conditions of an entail.

Presumptio hominis vel judicis.—The presumption of the man, or of the judge. This is the opinion or conviction of the judge, arising from the circumstances of the case laid before him. It differs from the *presumptio juris* in this, that the latter is that arising from statutory provision, decisions, or custom, while the former emerges from the circumstances of each special case, and is frequently strong enough to overcome the legal presumption.

Presumptio juris.—A legal presumption. This is a presumption fixed by statute, decisions, or custom, in favour of a certain argument or case, but which admits of being redargued by contrary proof. Thus, in moveables, property is presumed from possession; a debtor is never presumed to have given anything in gift to his creditor; a bond or bill found in the debtor's repositories is presumed to have been paid; the husband is presumed to be the father of all children to which his wife gives birth during the subsistence of the marriage, &c. In so far as the *presumptio juris* admits of being redargued, it differs from the

Presumptio juris et de jure.—A legal presumption, amounting to a legal rule. This does not admit of refutation; but the facts on which it is founded being admitted or proved, the presumption receives the weight and effect of a fixed rule of law. Thus, a minor with curators is not held bound by any contract into which he may enter without their consent; he is presumed to be incapable of acting for himself, and this presumption cannot be overturned, even where it can be proved that the minor has acted, and is capable of acting with great prudence and care, and advantageously for himself. So also the plea of lesion, as a ground of reduction, will not be sustained if the action of reduction is not brought within the *quadriennium utile*, the law presuming, from the party's silence during that period, that the deed or contract sought to be reduced was not to the minor's lesion,—a presumption which cannot be traversed, even by legal evidence to the contrary. In like manner, the law presumes a man to be men-

tally incapable of executing a settlement disposing of heritage, upon death-bed; and this cannot be redargued by the clearest proof of his mental capacity at the time of executing the settlemenr, or during the whole period of sixty days before his death.

Presumptione.—By presumption; *i. e.*, according to the *presumptio juris*. Bell's Prin., § 747.

Pretium affectionis.—The price of regard. This is the value attached to it by the owner of a subject, on account of the regard in which he holds it, and apart altogether from its intrinsic value. Thus heir-looms, gifts from deceased friends, &c., have a *pretium affectionis* attached to them, on account of the manner in which the owner has acquired possession. Damage is never estimated by this standard when the injury has been done without fraud or dole.

Pretium periculi.—The price of the risk; the payment in consideration of which the risk is undertaken. Such is the premium paid on a policy of insurance, either on a life or against fire, which varies in amount according to the nature of the risk. So also the interest paid in money advanced on bottomry or *respondentia* (called generally marine interest) partakes more of the character of a *pretium periculi*, or premium, than of mere interest for the loan of money, because, if the ship on which it is advanced is lost, the lender loses his right to claim the capital sum lent.

Primo fronte.—At first sight; palpably.

Primo loco.—In the first place. When a claimant in an action of multiplepoinding is preferred *primo loco* to the fund *in medio*, he is preferred to the exclusion of all other claimants, who can take no part of the fund until the claim preferred has been satisfied.

Primo venienti.—To the person who comes first. An executor, after having realised the estate of the deceased, is entitled to pay off his debts as they shall be claimed; that is, he is not bound to wait until all the claims against the deceased have been presented for payment, but may pay them as they are presented. It may happen that the executor, having paid all the claims presented in full, is unable to pay one subsequently presented, of the existence of which he was not previously aware. In such a case the executor is not per-

sonally liable, because he was entitled to pay away the estate to the creditors first claiming.

Primus actus judicii est judicis approbatorius.—The first act or step of procedure in a suit is held to be approbatory of the judge. The import of this maxim is, that any objection which can be urged against the judge before whom the action is brought must be stated at the outset, for if the party entitled to take the objection proceeds in the suit without taking it, his proceedings are regarded as an approval of the judge, which bars him stating the objection at any subsequent stage of the case. Thus, if a defender propone defences on the merits of the action brought against him, without declining the jurisdiction of the judge, he cannot thereafter decline the jurisdiction. Such objections must be stated *in limine*, or they are held to be waived.

Prior tempore potior jure.—Prior in date, preferable in right. This is the rule of law on which rights of preference in competitions are decided, the import of which is, that he whose right to the subject claimed has been first completed is preferred, as having the best right, to the exclusion of all others. Thus, the sasine first in date upon the record gives a preferable right to the lands over that afforded by a sasine subsequently recorded, without regard to the date of the instrument itself, or the conveyance on which it proceeds. On the same principle, the first confirmed title to lands held *a me* is preferred to that subsequently confirmed, although the infeftment last confirmed should have been first recorded. So also the preferences of arresting creditors are decided according to the dates of their respective arrestments, and not according to priority in point of time or date of the decree on which the arrestments proceed.

Privæ leges.—Personal laws; imperial constitutions having reference merely to one person. Under the civil law were included in this class all laws or ordinances which had reference alone to an individual, and did not affect the people generally, and that whether such ordinances were beneficial to the individual, (as in the case of imperial rescripts, by which a person was legitimated, a convict pardoned, &c.), or were disadvantageous to him. Such laws, however, in the general case, were passed for the purpose of conferring a benefit, and

hence the word privileges. In our law the term is applied to all acts affecting private, personal, or local interests, such as those authorising the construction of a railway, a road, restitution of family honours, titles of dignity, &c. These are not, in the strict sense, laws, and cannot therefore be recognised by the Courts, unless pleaded by the parties having the interest to do so.

Pro bono publico.—For the public good; for the advantage of the public generally. See *Pro privato*, &c.

Pro confesso.—As having confessed. Where a defender fails to appear to answer or defend a summons raised and executed against him, he is held *pro confesso*, and therefore decree is pronounced against him; that is, his failure to appear is regarded as a confession of the justice of the pursuer's claim, and on this inferred confession the decree proceeds. In the same way, where one party to a suit refers the point at issue to the oath of his opponent, and the latter fails to appear and depone under the reference, he is held as confessed that his case is unfounded, and that the other party's case is sound, and decree follows in terms of this implied confession.

Pro forma.—As a matter of form; a proceeding purely formal.

Pro hac vice.—In this matter; for the discharge of this duty or office. Some appointments are made for the discharge merely of a certain specified duty, which, being performed, the appointment falls. Thus, in the introductory part of a Court of Session summons, it is directed to messengers-at-arms "Our sheriffs in that part," which is the same as, our sheriffs *pro hac vice*. They are appointed the sheriffs or officers for the fulfilment of a certain office, namely, the execution of the summons; and on this being done the authority deputed to them ceases, in so far as regards that particular writ.

Pro indiviso.—In an undivided manner; in common. A *pro indiviso* right is one which gives to several proprietors a conjunct and common right in the whole subjects over which the right extends; and while each has an equal right to the whole, none of the proprietors can claim an absolute right to any individual portion. Heirs-portioners are *pro indiviso* proprietors of the inheritance to which they succeed. They have an equal right to the whole rents and profits of the estate

as a *cumulo* sum, but none of them can claim the rent or profit of any particular field or farm as her absolute right. Such a right constitutes a kind of partnership among the proprietors, under which they equally enjoy the profits of the subjects so held, while they equally bear its burdens and responsibilities.

Pro loco et tempore.—For the place and time. Where an objection has been taken successfully to the relevancy of an indictment, or anything occurs to induce the public prosecutor to delay proceeding with the trial, such as the absence of an essential witness, &c., he may, before the jury is sworn, desert the diet against the prisoner *pro loco et tempore*, and this reserves to him the power of indicting the prisoner again for the same offence, at another place and time. The prosecutor cannot thus desert the diet where the panel is arraigned on criminal letters, served upon him under the provisions of the Act 1701, cap. 6, for any desertion of the diet in that case amounts to a desertion of the cause *simpliciter*, which frees the panel for ever of all challenge or question touching the offence libelled; nor can he desert *pro loco et tempore* in any case after the jury has been sworn to try the cause.

Pro mutuum.—As if a loan. Where a person, under an erroneous belief of liability, paid a sum of money to another which was not due, the civil law gave an action, the *condictio indebiti*, for its recovery. The sum so paid was regarded as if it had been a loan in *mutuum*, which the lender was entitled to recover, and on account of this was called *pro mutuum*, or *quasi mutuum*. The action for recovery might be successfully resisted on either of two grounds: first, where the sum paid, although not legally exigible, was one due upon a natural or moral obligation; and, second, where the person knew, at the time of paying, that nothing was due, in which case the payment was held to be a donation. A difference existed between the case of money paid upon an error in fact, and that of money paid upon an error in law, regarding which see *Condictio indebiti*.

Pro non adjecto.—As not added. In the nomination of testamentary tutors, where a tutor is nominated who is incapable of filling the office through legal incapacity, or otherwise, this will not invalidate the appointment as regards the others. The name of the one incapacitated is regarded as *non*

adjectus, while the appointment as regards the others will be sustained. Anything in a deed which is not essential, but mere surplusage, is held *pro non adjecto*, and cannot affect its validity.

Pro non scripto.—As not written. Certain conditions attached to legacies or testaments are disregarded by our law, and are held *pro non scripto*—as if they had not been written, and did not form part of the deed; but to be thus disregarded, the conditions must either be impossible or illegal. Thus, if a testator directed that his heir should succeed, or a legatee receive the legacy bequeathed, only on condition of their committing a theft, or on their committing an assault, &c., the condition would be disregarded as illegal, and the heir or legatee would succeed without fulfilment of the condition. So also, if the condition be one of which the fulfilment is impossible; as, for example, that the heir or legatee should travel over Britain in a day. A distinction was regarded by the civil law between impossible conditions attached to a contract, and such conditions attached to a testament; in the former case they were held to void the contract, in the latter they were held *pro non scripto*. This distinction is also followed in our law. "As an obligation to perform impossible facts is null, so are those granted under an impossible condition; for the adjection of a condition which cannot exist, is an evidence that the parties did not seriously intend a bargain. But deeds are construed to be granted absolutely, and the condition is held *pro non scripto*, not only in testaments and legacies, but even in grants *inter vivos*, where the granter of the obligation lies under a natural tie to execute them." Ersk., B. 3, T. 3, § 85.

Pro omni alio onere.—For all other burden. A clause used in charters, the effect of which is to restrict the duties to be rendered to the superior by the vassal on account of the lands held by him, to those expressed in the charter. The clause (called the *reddendo*) generally runs in terms similar to the following: "Giving therefor yearly the said A. (the vassal) and his foresaids, for the lands and others above disponed to me and my foresaids, lawful superiors of the same, the sum of £ in name of feu-duty, at two terms in the year, &c., and these *for all other burden*, exaction, demand, or secular service what-

soever which can be any way exacted for the said lands and others, or any part thereof, in all time coming."

Pro parte—Partly; as regards a part. Under the civil law a testator could not die intestate *pro parte*, that is, as regards a part of his estate; his succession must have been either wholly testate or wholly intestate. Where a testator appointed a certain person his heir, and conveyed to him certain portions of his succession, but left other portions undisposed of, the law regarded the heir so named as the universal heir, and he succeeded accordingly. A different rule prevails with us; for while our law will give effect to the testator's will, in so far as this has been expressed by a valid instrument, and hold the deceased to be thus far testate; yet, if he has left property undisposed of by that instrument, the law will dispose of it according to the rules of intestate succession, giving it, not to the person succeeding under the deed, but to the heir-at-law, if it be heritage, and to the next of kin if it be moveables.

Pro parte virili—For one's own share or propotion. Where there are several vitious intromitters with the estate of a deceased, any one of them may be sued by a creditor of the deceased *in solidum*, for the whole debt due to him; but if he calls them all jointly in one summons, each is liable only for his own share of the creditor's claim, which is regulated according to the number of the defenders, without regard to the extent of their several intromissions.

Pro possessore habetur qui dolo desiit possidere—He is held as the possessor who, for a fraudulent purpose, cedes possession. Such a person cannot take benefit by his own fraud, and therefore all the liabilities of a possessor must be borne by him who has fraudulently quitted possession. See *Is qui dolo*, &c.

Pro privato commodo—For private convenience. This phrase is used in contradistinction to *pro bono publico*, and they may both be illustrated simply. A highway is constructed for the public good or convenience, and every one has a right to use it, while a private road is made for the convenience of the proprietor alone, and no one, without his permission, can use it without trespassing.

Pro quantitate hæreditatis et temporis—According to the

extent of the estate, and of the time. The casualty of ward entitled the superior to the whole profits of the ward-fee during the minority of the heir, and by the rule of an ancient law he was liable for a proportion of the debts of the deceased vassal, according to the extent of the estate and the length of time the heir was in minority. This was subsequently altered, and he was entitled to the profits of the estate without deduction, nor could his right be affected by any act (such as the constitution of servitudes) of the late vassal. The casualty of ward, and the other casualties proper to ward-holding, were abolished by the Act 20 Geo. II., cap. 50.

Pro rata.—Proportionally; for a proportion. Where several debtors are each liable for the whole debt, they are said to be liable *in solidum*, but where each is liable for his own share or proportion only, they are said to be bound *pro rata*. An example of both phrases may be found in the liability of partners; each is liable *in solidum* for the debts of the copartnery in a question with the creditor, but each is liable only *pro rata* in a question between themselves.

Pro rata itineris.—For the proportion of the journey or voyage. Where a ship, chartered to convey a cargo to a certain port for a specified freight, is prevented completing the voyage, either through the peril of the sea or hostile power, the master of the ship may tranship the goods, and thus conveying them to their destination, earn his full freight. But if, when the ship has been prevented proceeding on her voyage, the freighter himself tranships the cargo, the master is entitled to freight *pro rata itineris*, for the proportion of the voyage which he has accomplished.

Pro re nata.—Arising from some particular thing or circumstance. A meeting or proceeding *pro re nata*, is a meeting which has been called, or a proceeding taken in consequence of some emergency, which has rendered it necessary. Thus, a *pro re nata* meeting of presbytery, is one which has been called out of the ordinary course of presbytery meetings, for the special consideration of some case or circumstance requiring such attention.

Pro servitio burgali.—For burgal service. Burgage subjects were formerly held of the Crown in return for burgal service, which always included watching and warding in the

borough, whether this was expressed in the charter or not. All burgage lands are now held blench of the Crown.

Pro tanto.—For so much; to account of. Where a defender consigns a certain sum, which he admits to be due, in an action raised against him by his creditor, the latter, obtaining decree for the full sum claimed, is entitled to uplift the consigned money, and impute it *pro tanto* in extinction of his claim. Or where a defender is found liable in a sum sued for, but found entitled to his expenses, he may impute the amount of his expenses in extinction *pro tanto* of his creditor's claim, and obtain a discharge on payment of the balance.

Pro tempore.—For the time being; temporary.

Pro tribunali.—In Court; before the judge.

Pro virili.—For one's own share. This phrase is a contraction for *pro parte virili.* Ersk., B. 3, T. 9, § 55.

Probabilis causa litigandi.—A probable or plausible ground for action. Any one may raise and prosecute an action, whether he has reasonable grounds for doing so or not, the award of expenses against an unsuccessful litigant being generally a sufficient check upon unnecessary and groundless litigation. But when litigants, unable to afford the expense of an action, apply for the benefit of the poor's roll, either in the Supreme or Inferior Courts, against whom no available award of expenses can be given, it is necessary to ascertain that their ground of action is at least reasonable, so that if it is, they may not be denied the justice to which they are entitled; and if it is not, that their reckless litigation may not be allowed to proceed to the detriment of their opponent. For this purpose the Court appoints certain persons practising before it to enquire into the nature of the action, and the grounds on which it is based, and if they report that the applicant has a *probabilis causa litigandi,* he is admitted to the benefit of the poor's roll; if they report otherwise the application is refused.

Probatio probata.—Literally, a proved proof; that is, a proof which is not permitted to be impugned or redargued. Thus, the verdict of a jury, where it cannot be reviewed, is called *probatio probata;* and of the same nature is the finding of a Lord Ordinary upon the facts, who, of consent of parties, presides at a trial without a jury, under the provisions of the Act 13 and 14 Vict., cap. 36. In the latter case the find-

ings of the Lord Ordinary on the facts are final, unless they proceed upon some erroneous view of the law.

Probatio prout de jure.—A proof according to law. A proof *prout de jure* includes all the legal means of probation, parole, documentary, and oath of party; although, in practice, this phrase is understood to signify a general proof of the facts and circumstances of the case in which it is allowed, in contradistinction to a proof which is limited to the writ or oath of the party.

Procurationes ad resignandam in favorem.—Procuratories of resignation in favour of the disponee of a vassal. At one time resignation was the only form in which a superior could be compelled to receive as his vassal the disponee of the vassal who had previously held the lands. A superior can now, however, be compelled to enter a vassal by confirmation, and this has, for a very lengthened period, been the mode in common use by which a vassal's title is completed. See *In favorem.*

Procuratorio nomine.—In the name or character of a procurator. Stair, B. 3, T. 1, § 16.

Propriis manibus.—By one's own hands. Under the old form of infeftment, sasine was said to be given to the disponee *propriis manibus*, when the disponer appeared personally on the ground, and with his own hands delivered to the disponee the usual and necessary symbols, instead of this being done, as was most usual, by another person who acted as the disponer's baillie. This form of infeftment was, perhaps, most frequently adopted in the case of provisions being made to a wife or children, where the husband, receiving infeftment in lands he had purchased, at the same time gave his wife infeftment in a liferent right, both of which rights were included in the same instrument. Infeftment *propriis manibus* required no antecedent warrant, for it was unnecessary for an heritable proprietor to grant warrant to a baillie to do that for him which he was to do himself. "It is to be carefully observed, that sasines *propriis manibus* are not protected by the Act 6 and 7 Will. IV., cap. 33, which exempts sasines from challenge on the ground of erasure. On the contrary, they are expressly excepted from that statute, and justly so, inasmuch as the sasine *propriis manibus* is not like other sasines, merely

an attestation of the delivery of possession, but is by its nature an act of alienation, and embraces in itself the warrant as well as the delivery." (Menzies' Lectures, 571). A vassal, in like manner, was said to resign his lands *propriis manibus*, when he delivered the symbol of resignation to the superior with his own hands.

Proprio jure.—By one's own proper right.

Proprio nomine.—In one's own name. When a person sues for a debt due to himself, he sues in his own name and individual character; but where it is not due to himself, but to him for behoof of some other, he sues in that character in which he is entitled to claim it. Thus, a trustee or factor does not sue for a trust-debt, or one due to his constituent, in his own name, because to him as an individual, apart from the office with which he has been invested, the debtor owes nothing whatever: he therefore sues in that name and character in respect of which he acquires the title to sue. In the one case, where the money is due to himself, the claimant sues *proprio nomine;* in the other case, where it is due to him in respect of the office he holds, and for behoof of another, he sues *procuratorio nomine.*

Propter commodum curiæ. For the advantage of the Court. Stair, B. 4, T. 34, § 3.

Propter curam et culturam.—For care and cultivation. Ersk., B. 2, T. 6, § 31, and T. 10, § 10.

Propter delectum personæ.—On account of the choice or selection of person. Although, under many mandates, certain steps in fulfilment of the purpose for which the mandate is granted, have to be executed by or entrusted to others than the mandatory himself, yet a mandatory cannot delegate the whole of the authority, or the principal parts of his trust, to another, as this would render nugatory the mandant's *delectus personæ,* in exercise of which he chose and appointed his mandatory. See *Delectus personæ.*

Propter eminentiam masculini sexus.—On account of the superiority of the male sex. It is said to be upon this ground that a conveyance to a husband and wife in liferent, and their heirs in fee, is held to constitute a fee in the heirs of the husband. See *Potior est conditio masculi,* which is only another form of rendering the same maxim.

Propter fragilitatem sexus.—On account of the weakness of their sex. On this ground married women are not bound in fulfilment of their personal obligations, and cannot be subjected to personal diligence for civil debt. Stair, B. 1, T. 4, § 22.

Propter ingratitudinem.—On account of ingratitude. Formerly, when heritable rights were conferred gratuitously by the superior upon the vassal to ensure his fidelity and services, and even where the fee had been conferred for a price, but that inadequate to the value, the superior could revoke the gift and resume the lands on account of the ingratitude of the vassal. Under the civil law all donations could be recalled upon this ground; and this appears to have been at one time a rule of our law, although it does not now seem to be recognised.

Propter majorem securitatem.—For the sake of greater security.

Propter negligentiam hæredis jus suum non prosequentis.—On account of the negligence of the heir in not following up his right. By the early feudal customs, if, on a vassal's death, his heir neglected for a year and day to enter with the superior, his right to the lands was forfeited on account of such negligence, and they reverted in property to the superior. The right of the heir is still liable to the same forfeiture, though not so rigidly foreclosed by the lapse of time. The superior's remedy is now obtained under an action of declarator of non-entry, a decree in which entitles him to the whole rents of the property from the date of citation. If the heir takes an entry before decree, he is only liable in the relief duty due to the superior, and the expenses of the declarator; but if he does not enter until after decree has been obtained, the superior is entitled to the full rents. In judging of the heir's liability in these cases, the Court exercises an equitable interference with the superior's strict rights; and in one case, where the heir offered to enter after decree of declarator of non-entry had been pronounced, the Court, considering his delay in entering excusable, held him liable only in the feuduties. *Robin*, 13 June 1823.

Propter rem ipsam non habitam.—On account of not having had in possession the thing itself. Where one party

to a contract binds himself absolutely to deliver to another a certain subject, and fails to fulfil this obligation, he is liable in the damages occasioned by his failure. Such damage may arise from several sources, and among others, from the mere want of possession of the subject agreed to be delivered, because, by such a want of possession the buyer may have been unable to take advantage of a good market, a rise in prices, &c.

Prorogatio de loco in locum.—A prorogation (of jurisdiction) from one place to another. The consent of parties cannot confer any jurisdiction upon a judge outwith his own territory, and in this sense, as regards the power of the judge, there can be no such prorogation as that expressed by the phrase. But there may be such prorogation as regards the interest of the parties, and this takes place where a defender, not subject to the jurisdiction of the judge before whom he is cited to appear, acquiesces in the jurisdiction, and lodges peremptory defences.

Prorogatio de tempore in tempus.—Prorogation (of jurisdiction) from one time to another. There can be no prorogation of the jurisdiction of a judge where his jurisdiction is vacated, or its term expired. In another sense, however, such prorogation is known with us; as in the case where parties to a submission having agreed to abide by any decision pronounced by an arbiter within year and day, afterwards prorogate the arbiter's jurisdiction to a period more remote. Such prorogation to be effectual, it need scarcely be observed, must be agreed upon, and the minute embodying it executed before the expiry of the original term. If not, a new submission alone would confer jurisdiction on the arbiter, and be binding on the parties.

Protestatio contraria facto.—Protestation inconsistent with one's conduct while protesting. Stair, B. 4, T. 40, § 39.

Prout de jure.—According to law. A general proof of facts and circumstances is called a proof *prout de jure*, in contradistinction to a proof limited to the writ or oath of party. See *Probatio prout*, &c.

Provisio hominis non tollit provisionem legis.—The provision made by an individual does not take away or abrogate the provision of the law. By legal provision a widow is entitled to a certain part of her deceased husband's moveable

estate, and so are the children; and no testamentary provision of the husband or father can deprive them of this legal right. If, by his will or settlement, the deceased has made certain provisions for his wife and children, they may receive the benefit of such provisions without in any way prejudicing their claim to that which the law entitles them to; and should the deceased's provisions be declared to be in lieu of legal rights competent to his widow and children, they have the option of either accepting these provisions, and renouncing their legal rights, or of declining the provisions, and insisting on their *jus relictæ* and legitim respectively. What the law declares certain persons entitled to, they cannot be deprived of by private arrangement, unless they are parties consenting to it.

Provisione hominis.—By the provision or appointment of an individual. Heirs who succeed, through the provision or appointment of the testator, to that to which they would not have succeeded by force of law, are said to succeed *provisione hominis.* All heirs who so succeed are called heirs of provision.

Provisione legis.—By provision of the law. Heirs who succeed according to the rules of law regulating succession, without the consent or appointment of their ancestor, are said to succeed *provisione legis;* and are known as heirs-at-law.

Proximus pubertati.—Near puberty; having nearly attained the years of puberty, but still in pupillarity.

Puberes.—Minors; persons who have attained the age of puberty, which with us is 14 years in males and 12 in females.

Publica vindicta.—The defence or protection of the public interest; the legal punishment by which the public safety and interest is protected. See *Ad vindictam,* &c.

Pure.—Purely; unconditionally. Obligations are either *pure* or *in diem;* performance of the former is immediately prestable, because performance is at once due, it being burdened with no condition; while performance of the latter can only be insisted upon when that day arrives, or that condition is fulfilled, on which the obligant has bound himself to implement his obligation. When a condition has been fulfilled, it is said, technically, to have been purified.

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Qua.—As; in the character of. Thus, a widow is said to be decerned executrix to her deceased husband *qua* relict, and a creditor appointed to the office of executor is said to be decerned executor-dative *qua* creditor. So also, where a trustee sues for a debt due to the trust, he sues, not as an individual, but *qua* trustee.

Quadriennium utile: Is the name given to the period of four years, commencing from the attainment of majority, during which an action of reduction may be brought, on the ground of lesion, of any deed granted, or contract entered into, during minority. If no such action is brought within this period, the law presumes that the deed or contract was not to the prejudice of the minor; and this being a *presumptio juris et de jure* cannot be traversed by the clearest legal evidence to the contrary.

Quæ cadit in virum constantem.—That which would overcome a man of firmness and resolution. Stair, B. 4, T. 40, § 25. See *Ex vi*, &c.

Quæ cadunt in non causam.—Those things which we lose on the cessation of the title on which we held them. (Stair, B. 1, T. 7, § 7). Thus, for example, the right of the assignee of a liferenter to the fruits and benefits of the liferent, falls on the liferenter's death, because the title on which he holds then necessarily expires.

Quæ functionem recipiunt.—Things which perform the office, or supply the places of others. This is the latin definition of that class of things known in our law as fungibles, which alone can form the subject of a contract of *mutuum*.

This class includes all things which may be estimated generically, by weight, number, or measure. See *Pondere, numero*, &c.

Quæ non fieri debent, facta valent.—Things which ought not to be done, are held valid when they have been done. Some acts prohibited by law are, by virtue of such prohibition, essentially null, and never can be validated by the private agreement of the parties interested. For example, no obligation or contract arising *ob turpem causam* can bind the parties, or be enforced against them, even where they may have expressly waived any defence or objection upon that ground; nor can those obligations be validated by private agreement, which are declared by the law to be null, because they are contrary to the good morals or sound policy of the country. There are, on the other hand, some acts prohibited by the law which will be regarded as valid and binding after their actual performance. Thus, the Act 1594, cap. 216, prohibits the purchase, by a member of the College of Justice, of anything which forms the subject of a law-suit at the time when purchased, and that under the penalty of deprivation of office. The Act does not, however, declare the sale invalid, and therefore, while such a contract of sale is prohibited, it has been the rule in our practice to sustain the sale, but punish the purchaser in the manner prescribed. In short, this maxim applies to all legal prohibitions, where the sanction is the punishment of the doer, and not the nullity of the act done.

Quæ non mente sed manu tenentur.—This phrase is used by Stair (B. 1, T. 5, § 6), when treating of the obligations incumbent upon parents as regards their children. It scarcely admits of literal translation, but means those duties which arise from affection, as opposed to those which arise from legal provision; those obligations which are natural, performance of which lies in the option of the parent, and those which are civil, performance of which may be enforced by legal process.

Quæ non recipiunt functionem.—Things which do not perform the office, or supply the place of others; all things not falling within the description of fungibles. See *Quæ recipiunt*, &c.

Quæ perimunt causam.—(Pleas) which take away the ground of action. The effect of peremptory defences, when

sustained, is to take away the pursuer's ground of action altogether. The defender is then entitled to be assoilzied, and to plead *res judicata*, if the same question be raised in a new suit at the instance of the same party, or his representative. See *Perimere causam.*

Quæ sapiunt delictum.—Things which partake of the character of delict. "The Lords lately found, that these passive titles, *quæ sapiunt delictum*, should not be competent after the intromitter's death." Stair, B. 3, T. 6, § 5.

Quæ sequuntur personam.—Which follow the person. This refers to moveable property, which, by a legal fiction, is supposed to be always with the owner. On this ground succession to moveables is regulated; and deeds affecting moveables are interpreted and judged of according to the law of the domicile. See *Lex rei sitæ. Mobilia sequuntur*, &c.

Quæ servando servari nequeunt.—Things which cannot be preserved uninjured by keeping. Erskine states it as one of the powers conferred upon a general mandatory, that he may and ought to sell such of the mandant's moveable goods as are of a perishable nature. Where there is a dispute as to the right to some subject which, from its nature, is liable to perish entirely or suffer very material deterioration by being kept, our courts are in the practice, on the motion of either party, of ordering it to be sold, and the proceeds of the sale consigned to abide the issue of the cause. For example, such a course would be followed where a quantity of grain formed the subject of the dispute, as it might perish or be deteriorated in value, either intrinsically or by the fall of the market prices, if kept until the action was decided. Where the subject is not perishable, there is no reason for ordering it to be sold, and such order would not be pronounced except of consent of parties. This course is, however, sometimes followed, as perhaps it is most frequently done, where the right to live cattle is in dispute, because the expense of maintaining them is so serious, that their whole value or more might be thus expended before the rights of parties were settled.

Quæ singula non prosunt juncta juvant.—Things which, taken singly, or one by one, are of no avail, afford help or benefit when taken together. Thus in a reduction, if the pursuer sought to reduce a deed on the ground of circum-

vention, the jury might not think the acts proved to have been used sufficient to overcome the will of, or to deceive the granter; or if he sought to reduce on the ground of facility, the jury might not think that the granter was facile or of weak mind, and sustain the deed. But if both of these grounds were libelled as reasons of reduction, it might be seen how the circumvention, in an ordinary case insufficient, was in this particular case sufficient to deceive the granter on account of his facility, and these grounds thus taken together be sufficient to reduce the deed, while taken singly they would have been insufficient. But this maxim is applicable to almost every case that arises, for there are few in which the whole facts and circumstances considered together and as a whole do not form the basis of the decision. Each individual circumstance may be of little or no importance in itself, and yet acquire the greatest possible importance from the circumstances out of which it arose, or which followed it; and that is the import of this maxim.

Quæ solum Deum habent ultorem.—Crimes or wrongs which can only be punished by God. Stair, B. 1, T. 3, § 4.

Quæ sunt in patrimonio nostro.—Things which form part of our possessions; things held by us in property. Stair says that slavery reduces the slave from the category of persons to the position of a mere subject of possession similar to any other part of the proprietor's inanimate property. This was the position held by the slave under the civil law, where he was treated of not as a person, because persons had rights and incurred obligations neither of which belonged to a slave, but as *res*, a thing in which persons had rights.

Quæ temporalia ad agendum, sunt perpetua ad excipiendum.—Those things which afford a ground of action if raised within a certain time, may be pled at any time by way of exception. Some rights of action can only be exercised within a certain prescribed time, within which, if they are not exercised, the right falls; but that which would have been the ground of action may be pleaded as an exception, even after the lapse of the prescribed period. An illustration of this maxim will be found in Ersk., B. 1, T. 7, § 32.

Quæ transeunt per commercium.—Things which pass or transmit through commerce. "Vitious intromission being

penal, is not to be sustained against any as representing the intromitter, when no action is intended against the intromitter in his own life; after which no other can be able to clear the title of his intromission with moveables *quæ transeunt per commercium;* and so the defunct might have bought them *bona fide.*" Stair, B. 3, T. 9, § 14.

Quæquidem.—The name given to that clause in charters by progress which immediately follows the dispositive clause. In it the granter's title is deduced, so as to show the manner in which he has acquired, and the link or links in the progress by which he is connected with the vassal who was last publicly infeft. The name is taken from the first word of the clause as it stood in the old latin form. Regarding the nature and import of the clause, see *Modus vacandi.*

Quæritur.—Query; question. This word frequently occurs in our law-books, written *quære.* For an example of the word in its ordinary use, and written as in the form first given, see Stair, B. 3, T. 8, § 41.

Quamdiu sustinuit istam furiositatem.—How long he has laboured under that insanity or madness. This was one of the clauses of the old brief issued for the cognition of an insane person, by which the inquest was directed to inquire into and fix the date at which the insanity commenced. The effect of their finding was retrospective, for by the Act 1475, cap. 66, it was enacted that no alienation made by the fatuous person after the time fixed by the inquest as the commencement of his distemper should be valid. In like manner, no obligations granted by him after that date were binding, although granted before he was cognosced.

Quamprimum.—As soon as possible; forthwith.

Quandocunque.—At whatever time; at any time.

Quandocunque defecerit.—At whatever time he died. Ersk., B. 3, T. 8, § 44.

Quantum.—How much; the extent. Ersk., B. 2, T. 5, § 49.

Quantum et quale.—How much and of what kind; the extent and quality. It is not unusual for parties to a submission, to agree that, in the event of no final decree-arbitral being pronounced, the proof taken in the course of the submission shall be received as legal probation *quantum*

et quale (*i.e.*, to the same extent and as of the same quality or effect) in any after submission or process at law between the same parties regarding the same matter.

Quantum meruit.—As much as it is worth; value. Where services are rendered on hire, but without any specific arrangement being made as to the rate of the hire, there is an implied obligation on the part of the employer to pay a fair remuneration according to the extent and quality of the work done; and so the Court has frequently decerned in cases where the amount of the remuneration was disputed, for such sums as they deemed the services to be worth. See the case of *Sinclair*, 22d February 1831. Many professional men are remunerated for their services according to the *quantum meruit*, where indeed it would scarcely be possible to fix any specific payment, as the amount of the service cannot be ascertained until it has been rendered. Architects in preparing plans, civil engineers for examinations and surveys, &c., may be taken as instances.

Quantum nunc valent.—How much they (the lands) are now worth.

Quantum valuerunt tempore pacis.—How much they (the lands) were worth in time of peace. For an explanation of this and the preceding phrase, see *Antiquus et*, &c.

Quarta Falcidia.—That fourth of a testator's estate which, by the *Lex Falcidia*, he was prevented disposing of to the prejudice of the heir. By the law of the Twelve Tables, a testator was permitted to bequeath his whole estate in legacies; but at a later period it was found to be necessary for the sake even of testators themselves, and in order to ensure the carrying out of their intentions, that this power should be placed under certain restrictions. The great essential of a testament under the civil law was that there should be an heir formally and validly appointed; if he accepted, he was bound to fulfil its directions, and he also became liable for the testator's obligations; but if he declined the character of heir and renounced the succession, the testament fell, the deceased was regarded as having died intestate, and the estate was distributed according to the rules regulating intestate succession. When, therefore, the testator left the whole, or almost the whole of his estate in legacies, the heir generally

declined entering upon the succession, because by entering upon it he took no real benefit while he incurred liability for the testator's obligations; and thus the intentions of the testator were frequently frustrated. To remedy this certain laws were passed, the first of them being the *Lex Furia*, which forbade almost every one receiving by legacy more than 1000 *asses;* but this law failed to effect the object it had in view, for a testator, by multiplying the number of legatees, might still have exhausted the whole of his estate. The *Lex Voconia* was then passed, which prohibited the testator bequeathing to any one a sum greater than that left to the appointed heir, but this law also failed; for, by distributing his goods among a great many legatees, giving to none of them more than the sum left to the heir, the testator had the means of reducing the heir's portion to a sum so small, that it was insufficient to induce him to undertake the office and responsibilities of heir. Lastly, the *Lex Falcidia* was passed, by which the testator was prohibited bequeathing in legacies more than three-fourths of his estate, so that the heir (or heirs, if there were more than one) should receive at least one-fourth of the testator's succession. This sum reserved to the heir was called, after the law which created it, the falcidian quarter or portion. Justinian introduced some changes in the law on this point, for he enacted, that if those entitled to the *quarta* (namely, those who were appointed the heirs under the testament) were more than four in number, they should be entitled to a half instead of a fourth; but if less than four, then they should be entitled to a third.

Quarta Trebellianica.—This was the fourth which an heir in trust was entitled to retain out of the succession when transferring it to that person to whom, by the testament, he was directed to transfer it. There existed considerable similarity between this and the *quarta falcidia;* that being applied in the case of legacies, this in the case of *fideicommissa.* If the testator directed the heir to transfer the whole, or almost the whole of his estate to some other person, the heir frequently refused to accept his appointment, as it brought him little or no benefit, and inferred considerable liability. To prevent the will falling on the heir's refusal, it was enacted, in the time of Justinian, by the *Senatus-consultum Trebel-*

lianum (so-called because it embodied the provisions of a previous *senatus-consultum* of that name, along with others touching the same point of law), that where the heir voluntarily accepted the character and fulfilled the directions of the testator, he might retain a fourth of the succession without being made liable for any charges beyond those attaching to the portion he so received. If the heir refused to take up the succession and transfer it as directed by the testament, he could be forced to do so, in which case he was not entitled to retain any portion whatever, nor did he incur any responsibility, which was transferred entirely to the person receiving the estate.

Quarum natura est ut aliæ aliarum ejusdem generis rerum vice fungantur.—The character of which is, that their place may be supplied by other things of the same kind. This is a description of that class of things known in our law as fungibles. See *Pondere, numero, &c.*

Quasi ex contractu.—Arising as if from contract. See *Ex quasi, &c.*

Quasi ex delicto.—Arising as if from delict. See *Ex quasi, &c.*

Quasi feudum.—A kind of fee or heritable right; and generally, that kind of heritable right which arises in money when heritably secured. See *Feuda pecuniæ.*

Quem nuptiæ demonstrant.—Whom the marriage indicates or points out. See *Pater est, &c.*

Quem sequuntur commoda eundem et incommoda sequuntur.—He who reaps the benefits must also bear the disadvantages. On the principle of this maxim, an heir who succeeds to his ancestor's estate is liable for his ancestor's obligations; for as he takes the advantages or benefits conferred upon him by the succession, he must also bear the disadvantages with which the estate is burdened. So also the purchaser of goods still undelivered, and in the seller's custody, must bear all the loss or disadvantage arising from deterioration, because he reaps all the benefit which may arise through accretion or otherwise.

Querela inofficiosi testamenti.—The complaint against an inofficious testament. A testament was considered *inofficiosum* under the civil law, when, although validly and formally

executed, it violated by its terms those duties which affection and natural obligation made incumbent upon the granter; as, for example, when the testator appointed a stranger as his heir, to the exclusion of his children and other relatives. Such a testament could be set aside by the testator's relatives by the action known as the *querela inofficiosi testamenti*, which proceeded upon the presumed insanity of the testator at the time of executing it. It is not known at what date this action was first introduced, but it is treated of by Justinian in the following terms:—"Since parents often disinherit their children, or omit them in their testaments without any cause, children who complain that they have been unjustly disinherited or omitted, have been permitted to bring an action for setting aside the inofficious testament, on the supposition that their parents were not of sane mind when they made their testament. This does not mean that the testator was really insane, but that the testament, though regularly made, is inconsistent with the duty of affection the parent owes." (Just. Inst. B. 2, T. 18, Pr.) This action was first competent to children, and if there were no children, or if they declined to sue, then to the testator's parents, and failing them to his brothers and sisters, although the latter only had right to insist in this action where the heir appointed was a dishonourable person. The *querela* could only be adopted as a last resource, and when no other mode of procedure remained by which the relatives might vindicate their right to the succession, and it required to be brought within five years after the heir's entry. It need scarcely be observed that in our law it forms no valid objection to a testament or settlement, that it violates natural duty or obligation.

Questio voluntatis.—A question of intention.

Qui approbat non reprobat.—One who approbates cannot reprobate. A person is said to approbate and reprobate a deed when he seeks to take an advantage or benefit conferred upon him by one portion of it, while he seeks to disregard or dispute the validity of another portion which imposes some restriction upon the benefit, or burdens it with a condition. This is not permitted by our law, which requires that a deed shall be taken altogether, or rejected altogether. Thus,

where an heir seeks to reduce a deed executed to his prejudice *in lecto*, which, while it revokes a former deed excluding the heir, still gives the estate past him to another, he cannot approbate the deed in so far as it revokes the former conveyance which was unfavourable to him, and at same time reprobate it on the ground of its having been granted on deathbed. Nor can an heir approbate his ancestor's settlement in so far as it conveys the estate to him, and reprobate it in so far as it imposes burdens upon the estate, or charges the heir with the payment of certain legacies. This doctrine of approbate and reprobate is known in English law phraseology as the doctrine of election.

Qui cedit et retinet nihil agit.—One who cedes or transfers and yet retains, does not transfer effectually. Formerly, the mere sale of moveables did not pass the property in them until delivery had followed; so long as they remained in the custody of the seller or cedent undelivered, no effectual transference of the property had been effected. The law has undergone considerable change on this point since the passing of the Mercantile Amendment Act, concerning which, and its effect upon the rule of law expressed in this maxim, see *Dans et*, &c.

Qui consulto dat quod non debebat presumitur donare.—One who gives deliberately to another what he does not owe is presumed to give it as a donation. Where any one pays another that which he does not owe him under an erroneous belief of obligation, he is entitled to recover it under the *condictio indebiti*. But where the payment is made deliberately, and in the full knowledge that it is not due, no action for recovery will lie at the instance of the payer, because in such cases the law presumes donation, and donations *inter vivos* (except between husband and wife) are not revocable.

Qui facit per alium facit per se.—Where one does a thing through the instrumentality of another, he is held as having done it himself. On this principle a master is liable for the consequences of any act done by his servant in the ordinary course of his duties. Thus, if a coachman, while driving his master's carriage, should, through recklessness or inattention, inflict an injury upon a foot passenger by driving over him, or otherwise, the master is responsible for the injury so inflicted. But a distinction now prevails between the case

where the injury is inflicted upon a stranger, and that where the injury is inflicted upon a fellow-servant engaged in the same common employment with the one occasioning the injury. As the master has the selection of those whom he employs, he is responsible if he selects an improper person; and he is presumed to be an unfit or improper person to fulfil the duties for which he was engaged, if in the performance of them he, through carelessness, recklessness, or incompetency, inflicts damage upon another not in the same service. But a servant is supposed to be aware of the perils to which he exposes himself, not only from his own want of care, but also from the want of care of those necessarily employed with him, and the law presumes that he contracts upon that footing. He is not, therefore, entitled to recover from the master damages for injury inflicted through the carelessness of a fellow-servant. The question of the master's liability or non-liability in the latter of these cases has given rise to much controversy, the import of which will be found in the case of the *Bartonshill Coal Company*, 17th June, 1858, 3 Macq. 266, where the point was finally determined. Out of this controversy another arose as to what constituted common employment, and who were fellow-servants in the sense employed in the decision just cited. On this point the reader may be referred to the cases of *M'Aulay*, 9th March 1860, and *Peters*, 11th January 1861. This maxim has application also in questions arising out of the commission of crime, but here its application is very limited. If a master orders his servant to steal, or to commit any act which is obviously a crime, it will infer his punishment as having been act and part engaged in the criminal act; but it will not be regarded as his act alone; it involves also the servant, who will not be absolved from the mere fact that he was obeying an order, which it was clearly his duty to disobey. But if one person gets another to commit an act for him which is criminal, but not obviously so, the doer of the act, if he had no guilty knowledge, is guilty of no crime, but the person for whom he did it is, and must bear the punishment attached to its commission. Thus if A forges a bill, and gets B, ignorant of its being a forgery to utter it, B is guilty of no crime, while A is guilty both of forgery and uttering.

Qui in utero est, pro jam nato habetur, quoties de ejus commodo quæritur.—A child in the womb (yet unborn) is held as already born, in any question which may arise touching its rights or interest. Accordingly, it is sufficient to bar any service at the instance of the nearest heir to a person deceased, if the deceased's widow has been left pregnant. While there is thus the probability of a nearer heir through the widow's delivery than the heir seeking to be served, he is held not entitled to the character of nearest heir, the law regarding him in the meantime as excluded by the child *in utero*, in the same way and to the same effect as if that child was already born.

Qui justus esse debet.—Who was bound to be just. Ersk., B. 2, T. 4, § 3.

Qui prius jus suum insinuaverit preferetur.—He is to be preferred whose right has been first recorded. Of two sasines proceeding upon conveyances of the same subjects and by the same party, that one is to be preferred in a competition of rights which is first upon record, even where it is last in date. It is preferred to the effect of giving the party in whose favour it is, the full right conveyed by the disposition on which it proceeds, and that to the entire exclusion of all others. So also, when two assignations are granted of the same debt, that which is first intimated is preferable, even although it may have been executed and delivered of a later date than the other. The verb *insinuare* is used in law language to signify recording, or intimation, but most frequently the former. An instance of its being used in the former sense will be found in Just. Inst., B. 2, T. 7, § 2; and for an instance of the latter, see Menzies' Lectures, 243. See *Prior tempore*, &c.

Qui suum recipit licet a non debitore, non tenetur restituere.—He who receives that which is his own (or that which is due to him), although it be not from his debtor, is not liable in restitution. When a payment is made to any one by another under the erroneous belief that he is bound to make it, restitution, as we have seen above, can be insisted on under the *condictio indebiti*. But where, on the other hand, the payment is really due, the receiver cannot be compelled to restore it simply because the person paying it was

not himself the proper debtor in the obligation. For example, if a creditor is pressing a debtor for payment of his debt, and a friend of the latter, in the expectation of receiving the amount from him at a future period, in the meantime settles the creditor's claim, he cannot insist on restitution by the creditor of the sum so paid, in the event of his failing to obtain reimbursement from the debtor.

Qui tacet consentire videtur.—He who does not object is held as consenting; silence implies consent. Mandate may either be express or tacit; the former, when given expressly in words or in writing; the latter, when it is inferred from facts implying it. Thus, where a party, in the knowledge that certain law proceedings are being taken in his name, takes no steps to disclaim them, he is held from his silence to have authorised them; his silence implies that he consents to their being taken. This maxim has frequent application also in questions of proof, for it is competent (and very common in practice) to adduce evidence of statements made in the presence of one of the parties, which, if he did not deny them at the time, are regarded as true statements of fact. His silence, in such a case, implies an admission of the statement; he is held as consenting to it by his silent acquiescence.

Qui utuntur communi jure gentium.—Who use the common law of nations. Stair, B. 3, T. 1, § 12.

Quia emptores.—The English statute of 18 Ed. I., cap. 1., so called because these are its introductory words. The object of this statute was to abolish subinfeudation, and to render the disponee upon infeftment at once the vassal of his author's superior. It was at one time thought that the provisions of this statute had been at an early period imported into the law of Scotland by the Act 2 Rob. I., cap. 24, but modern lawyers deem it very doubtful whether that Act is authentic; at all events, there is no reason for believing that it was ever observed. See *Alienatio feudi.*

Quia ita lex scripta est.—Because the law is so written; because such is the tenor of the statute law. In the case of *Kilpatrick,* M. 12061, where an heir repudiated his father's bond on the ground that it was null, in respect it was wanting in the legal solemnities, not having the writer's name, "The Lords thought it in a court of conscience a good and sufficient

bond, but, as our law stood, it was null, though it was both unmannerly and unneighbourly to propone this nullity, yet, being proponed, the Lords behoved to sustain it, though hard, *quia ita lex scripta est.*"

Quia succedunt in universum jus quod defunctus habuit.—Because they succeed to every right which the deceased had. This is given by Stair as the reason why "heirs-in-law are called universal successors." B. 3, T. 4, §, 23.

Quia surrogatum sapit naturam surrogati.—Because the substitute partakes of the character of the thing for which it is substituted. Stair, B. 2, T. 2, § 14.

Quibus deficientibus.—Whom failing; *i.e.*, failing in the sense of having succeeded and died, and differing in that respect from

Quibus non existentibus.—Whom failing; in the sense of never having existed. Thus, if a dispositive clause of a deed be conceived in these terms:—"To A, whom failing, to B," and A succeeds, but afterwards dies, the succession opens up to B, on what is technically known as the failure of A, that is, his death; this is an example of the first of these two phrases. But if the disposition be by A "to B, failing heirs of A's body," B succeeds in the event of A having no heirs on their failure, or non-existence. At the time when sasine was necessary to complete a feudal title, it was of great importance, in making up the successor's title, to regard the exact terms of the dispositive clause, for it depended upon it whether the successor was a conditional institute or a substitute; if the former, his title was completed by infeftment on the disposition; if the latter, he required a service to connect himself with the succession. In the two instances which have been given above of a dispositive clause, the first is an example of that clause conferring upon B the character of substitute, while the second confers upon him the character of conditional institute. There is, perhaps, no nicer question in conveyancing than that of conditional institution and substitution, nor one requiring more care and ability properly to solve. The late Professor More states the distinction between them thus:—"The distinction between substitution and conditional institution seems to turn upon this—whether, *under the deed*, any person could possibly intervene between the

granter and the person who is *nominatim* called, because the mere possibility of such intervention seems to be held sufficient to create a case of substitution. Where there is a proper conditional institution, the deed will entirely fall and be evacuated if the condition should not be purified; but where there is a substitution the deed subsists, and the substitute may claim under it at any time till the destination in his favour shall be altered." More's Notes on Stair, 327. On this question, reference may be made to the very instructive case of *Fogo*, 11th March 1842, where the point was considered by the whole Court under a remit from the House of Lords.

Quid actum est.—What has been done; or, that which has been done.

Quid juratum est.—What has been sworn; or, that which has been deponed to. In judging of the import of evidence two questions generally arise for the consideration of the judge—namely (1), What have the witnesses said? and (2), How far is their statement true, and to be relied upon? But in considering the effect of the oath of one of the parties emitted under a reference, the only question for decision is that expressed in the words of the phrase, What has been deponed to. It must be taken as true in so far as it bears upon the question at issue, and cannot be rebutted by any evidence whatever, because the reference proceeds upon a *quasi* contract that the parties shall abide by, and have their dispute settled according to its terms. As to the special cases in which proof may be allowed even after reference, see *Non memini.*

Quid juris.—What is the law. A form of interrogatory often used in putting a doubtful or difficult case.

Quid pro quo.—Something given in return for something else. Thus, in the contract of sale, the price paid for the commodity, or in location the hire paid for the loan, is the *quid pro quo.*

Quid valet nunc.—What it is now worth. See *Quantum nunc.*

Quilibet enim juri pro se introducto renunciare potest.—Any one may renounce a right which has been introduced for his own advantage. For example, a minor may renounce

the right which the law affords him of reducing any deed granted by him to his lesion in the course of his minority, or of refusing implement of an obligation undertaken by him by contract during that period. So a widow or children may renounce their respective rights in the moveable goods of the husband, or father, either in consideration of a provision made in lieu of it, or gratuitously, without any consideration; and an heir may renounce his right to reduce the settlement executed to his prejudice by his ancestor upon deathbed. But while privileges conferred by law may be thus renounced, defects in what the law regards as essentials cannot be remedied by the mere departure from objection on the part of the person interested. So a deed which wants the name and designation of the writer, or of the witnesses, is essentially null, and cannot be set up by the fact of the person interested in objecting to it departing from objection on that ground.

Quilibet titulus excusat a spolio.—Any kind of title excuses from the charge and consequences of spuilzie; that is, any reasonable or probable excuse for the alleged act of spuilzie will be sufficient to elide its consequences. See *Levis exceptio, &c.*

Quisque est rei suæ moderator et arbiter.—Each one is the manager and disposer of his own affairs, or of his own property; every one may dispose of that which is his, according to his own discretion and pleasure. The maxim holds good in every case where positive law has not placed a restriction upon the exercise of the rights of property. An example of such restriction may be found in the rule of law which forbids the wanton exercise of those rights, to the detriment of a neighbour. See *Interest, &c.*

Quoad civilia.—As regards civil rights and benefits. See *Quoad sacra.*

Quoad creditorem,—debitorem.—As regards the creditor, —debtor.

Quoad excessum.—As regards the excess. Where a husband makes a post-nuptial provision in favour of his wife commensurate with his circumstances and natural duty, it is not subject to revocation by him as a donation. But if the

provision be immoderate he may revoke it *quoad excessum*, in so far as it is excessive. In the same way, the creditors of an insolvent husband can set aside any such post-nuptial provision in so far as regards any excess in that provision not warranted by the husband's social position or by the state of his affairs at the time of making it. Such a provision, although strictly speaking gratuitous, and therefore a donation, is not regarded in the same light as an ordinary donation *inter virum et uxorem*, because, as it proceeds upon a natural obligation, it is considered in some measure onerous, at least to the effect of depriving the husband of his right to revoke.

Quoad fiscum.—As regards the fisk, or the rights of the Crown. See *Fiscus.*

Quoad maritum.—As regards the husband; in so far as the husband is concerned.

Quoad mobilia.—As regards moveables, or moveable estate.

Quoad non executa.—In so far as regards the acts not done. In the event of an executor-dative, who has been appointed by the Commissary to realise and administer the estate of a deceased, dying after the performance of certain acts of administration, but before the whole duties of his office have been fulfilled, another executor may be appointed *quoad non executa; i. e.*, with regard to those duties not fulfilled, and those acts of administration yet to be performed.

Quoad potest.—In so far as one is able; to the extent of one's power.

Quoad reliquum.—As regards the remainder, or balance. When a debtor pleads compensation to a certain extent of the debt sued for, in an action brought against him by his creditor, *quoad* the sum due to him (if his plea be admitted or sustained) the creditor's right of action falls; but *quoad reliquum*, after making deduction of the sum pled in compensation, the creditor's right of action remains.

Quoad sacra.—As regards sacred things, religious duties and observances. "It sometimes happens that lands, where they lie at too great a distance from the church to which

they originally belonged, are, by the Commission-court, annexed *quoad sacra* to another parish, the church whereof lies at a lesser distance from these lands. By annexing *quoad sacra* is understood, that the inhabitants of the annexed lands are, for their greater conveniency in attending divine service, brought under the pastoral care of the minister of the church to which they are annexed. But such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish; and therefore they remain burdened with the payment of the stipend to that church from which the inhabitants were disjoined." Ersk., B. 2, T. 10, § 64. Lands may thus be *quoad sacra* in one parish but *quoad civilia* (as regards the civil rights of the minister, his temporalities, &c.), may be held as belonging to another.

Quoad valet seipsum.—As regards its real value; in so far as it is worth.

Quoad valorem.—As regards the value; to the extent of the value. "Other heirs, not being heirs-portioners, are liable for the defunct's debt *in solidum*, except heirs substitute in bonds, who are only liable *quoad valorem* in the sums in these bonds." Stair, B. 3, T. 5, § 16.

Quod fieri debet facile presumitur.—That which ought to be done is easily presumed. The law always presumes that any act has been properly and effectually done, performance of which is required by law. For example, it is required, in order to render the execution of a deed valid, that the instrumentary witnesses to it should either see the granter subscribe, or hear him acknowledge the subscription previously adhibited to be his. The legal presumption therefore is, if the deed be *ex facie* regularly tested, that the witnesses were present and saw the subscription, or heard it duly acknowledged. Such a presumption may be redargued, but that can only be done by the clearest contrary evidence; for in the case of *Cleland*, 15 Dec. 1838, the Court unanimously sustained the challenged settlement, although both instrumentary witnesses expressly deponed that they neither saw the granter sign it nor heard him acknowledge his subscription. See *Omnia rite*, &c.

Quod meum est sine me alienum fieri nequit.—That which is mine cannot become the property of another without my act. The mere fact of loss of possession, either feloniously or through

accident, does not deprive the owner of a subject of the right of property in it; and, accordingly he may vindicate his right and claim the subject wherever or in whose hands soever it may be found. If the subject has been stolen from its owner, the theft attaches as a *labes realis* to the title of any one acquiring it even onerously; and persons finding property which has been accidentally lost, and not restoring it to the owner if he is known, or to the police authorities if the owner is not known, but retaining it in their own possession, are by such acts held to be guilty of theft. There is an exception, however, to the rule expressed in the maxim, namely, that while a right of property in the general case cannot be transferred except by the owner or with his consent, such transference may be validly effected by the operation of legal diligence, without the consent of the owner. Moveable property may be so transferred by arrestment and furthcoming, by poinding and sale; while heritage may be transferred by adjudication.

Quod natura omnia animalia docuit.—That which nature has taught to all animals. This is the civil law definition of the law of nature. Just. Inst., B. 1, T. 2, Pr.

Quod naturaliter inesse debet presumitur.—That is presumed which ought naturally to be. The rules of succession proceed upon this maxim; and accordingly, when a father dies without disposing of his estate, the law presumes his will and desire in regard to it to be that which, from natural duty and affection, it ought to be, namely, that his children should succeed, and the estate is therefore distributed among them.

Quod non in cœtu neć vociferatione dicitur, id infamandi causa dictum.—That which has been said, not in a public assembly nor by way of violent outcry or abuse, is held to have been spoken for the purpose of defaming. The essence of defamation, as a ground on which obligation for damages in consequence thereof is founded, is the intention to defame by the defamatory or libellous expressions used; and this intention, or *animus*, as it is technically called, is inferred from the words themselves, and from the circumstances in which they are used. Thus, if any one should go about volunteering the statement that a person formerly his servant was a thief, such statements, being gratuitous and uncalled for, would be regarded as defamatory and actionable, because no other reason could be as-

signed for their being made than that the person making them was actuated by the malicious desire, the *animus*, of defaming his former servant. But if the statement is made to one enquiring after the servant's character before employing him, or one otherwise personally interested in his honesty, the former master may (assuming always that it was the fact) tell of the servant's dishonesty without incurring any liability for damages on that account: in that case there is no *animus defamandi*. Again, if one person in a passion should use very intemperate and libellous language towards another whom he had never previously met, or, having known, had never previously maligned, malice, in such a case, would hardly be presumed, and if, when the passion had subsided, an apology was offered as publicly as the offence had been perpetrated, it is not likely that any action for damages would lie. In each case, as has been said, the existence of malice or its non-existence, will be very much inferred from the peculiar circumstances out of which the action has arisen.

Quod nullius est fit domini regis. — That which is the property of no one becomes the property of the sovereign. This rule applies properly to land and real rights, which, when vacant, are held to belong to the crown. It proceeds upon the feudal principle that all real rights are vested in the sovereign, who can only be divested of those rights on their being specially vested in another. It applies also to moveable subjects the right of property in which has been abandoned by the owner; and also to treasures hid in the ground, the owner of which is not known. See *Res nullius*.

Quod nullius est fit occupantis—That which is the property of no one becomes the property of the person finding or taking possession of it. This rule applies strictly to those things which have never previously been occupied or held in property by any one. Thus wild beasts become the property of the hunter who takes or kills them; and game becomes the property of the person taking it, even although his pursuit of the game has been unlawful. A poacher, therefore, who has been caught in the act of taking the game, while he may be punished for the violation of the law, cannot be deprived of the game which he has taken, unless the confiscation of it is made part of the penalty, as it is his own by the mere fact of

first occupancy. This rule is extended in England to the case of money found upon the street or road, which becomes the property of the finder if the former owner cannot be discovered. See *Res nullius.*

Quod pure debetur presenti die debetur.—That which is due purely or unconditionally, is due now. When performance of an obligation is conditional on the occurrence of some event, or where payment of a debt is only exigible on a day yet future, performance cannot be demanded of the one until the condition has been purified, nor can payment be insisted on of the other until the arrival of the specified day. But if the obligation be unconditional, and the debt presently due, performance and payment are due and prestable at once.

Quod salvum fore receperint.—That which they received that it might be safe; that which they received for safe custody. The liability of shipowners, innkeepers, and others falling within the provisions of the edict *nautæ, caupones,* &c., for restitution of things lost, is limited to the value of those things which had been entrusted to them for safe custody or safe delivery. If the traveller makes himself specially the guardian of his own property, the innkeeper's liability for loss ceases. See *Nautæ, caupones,* &c.

Quod statim liquidari potest, pro jam liquido habetur.—That which can at once be rendered liquid is held as liquid. A liquid debt is one that is already constituted, such as by decree, bill, etc. It is essential to the plea of compensation that the debt or claim so pleaded shall be liquid, and it is to this plea that the present maxim is most generally applied. Erskine, in treating of this subject, says:—"Though the aforesaid Act (1592, cap. 143) requires that all grounds of compensation be instantly verified; yet, by our uniform practice for near a century, which seems grounded on the Roman law, if a debtor in a liquid sum shall plead compensation upon a debt due by his creditor to him, which requires only a short discussion to constitute it, sentence is delayed *ex aequitate* against the debtor in the clear debt, that he may have an opportunity of making good his ground of compensation, according to the rule, *Quod statim,* &c. Agreeably to this, compensation has not only been admitted, where the debt was offered to be proved instantly by writing, or by the oath of

the party; but the extract of the pursuer's decree hath been superseded for some months, where the liquidation of the debt required a proof by witnesses." (B. 3, T. 4, § 16.) See *De liquido*, &c.

Quod tibi fieri non vis, alteri ne feceris.—Do not that to another, which you would not that another should do to you. Stair B. 1, T. 1, § 1.

Quodammodo jurisdictionis voluntariæ.—Belonging in some measure to voluntary jurisdiction. Ersk., B. 1, T. 2, § 28.

Quomodo desiit possidere.—In what way he ceased to possess, or, lost possession. One who has lost possession of a moveable subject, when claiming it from another in possession of it, is bound, in support of his claim, not only to prove his previous possession but also to show how that possession ceased, as, for example, that it was stolen from him, or that he lost it accidentally, or that he gave it to another in loan who had lost it, &c.

Quorum bonorum.—The name of one of the interdicts known in the civil law, and deriving that name from the introductory words of the *formula* appropriate to it. When a testator's will was defective, so as to be ineffectual according to the strict civil law, or where it was *inofficiosum*, the Prætor, in the exercise of his equitable jurisdiction, gave possession of the goods of the deceased to that person whom he deemed to have the best right thereto. The *bonorum possessio* granted by the Prætor was not, as the name implies, a real and actual possession, but was a right conferred by him upon the person to whom it was given, to succeed to the deceased, and take or recover possession of his estate—a right which the strict civil law could not confer—and it was under this interdict that such person *enforced* his right to possession. For example, children who had been passed over by an inofficious testament, not being heirs, properly so called, had no right to the succession such as the civil law could recognise; but under this interdict they recovered the inheritance from the person who held it under the testament. This interdict was the one granted where possession had never been previously had. See *Unde vi.*

Quorum usus consistit in abusu.—The use of which consists in consuming them. Fungibles are of this character; and

because they perish in the using can, consequently, never be the subjects of a liferent right, which is a right to use and enjoy a subject during life, without destroying or consuming its substance.

Quot articuli, tot libelli.—As many points of dispute, as libels. Ersk., B. 4, T. 1, § 65.

Quota.—A share or proportion.

R

Rapina.—Robbery; theft committed by violence.

Ratio decidendi.—The reason of a decision; the ground on which a decision proceeds. At one time judges were not bound to state the grounds on which they decided the cases before them; but a different rule now prevails. Sheriffs and Sheriff-substitutes are now bound to set forth, in any interlocutor disposing in whole or in part of the merits of the cause, (and in certain other interlocutors specified in the statute), or in a note appended to and issued along with it, the grounds on which they have proceeded. This was rendered imperative by the Act 16 and 17 Vict., cap. 80, § 13. In practice, the provisions of this statute are regarded by the Judges of the Supreme Court, as well as by inferior judges.

Ratio scientiæ.—The reason or ground of knowledge. When a witness has spoken definitely to a certain fact it is of importance to ascertain his *ratio scientiæ*, that is, the grounds on which his knowledge of that fact to which he has spoken is based. If he knows nothing of the matter from his own personal knowledge, but has acquired his information from the statements of some third party, his *ratio scientiæ* is hearsay; and such evidence is valueless. If, on the other hand, he has acquired the knowledge from personal observation; if he has seen the act performed, or heard the words uttered regarding which his testimony is being given, his evidence is then of the most valuable and decisive character. This phrase is frequently written *causa scientiæ*.

Ratione causæ.—By reason, or on account of, the nature of the case. When a judge is declined, on account of his in-

competency to deal with the special question at issue, he is said to be declined *ratione causæ*. On this ground sheriffs, and other inferior judges, may be declined in questions of heritable right, the Court of Session may be declined in criminal cases, &c.

Ratione contractus.—On account of the contract. By entering into a contract, the contracting parties may, in certain cases, render themselves amenable to the jurisdiction of a judge, to whose jurisdiction they would not have been amenable had the contract not been entered into. Thus, a foreigner entering into a contract with a Scotchman, for the performance of certain works or services to be performed in Scotland, renders himself amenable to the jurisdiction of the Scotch courts in any question arising out of the contract. The contract itself is sufficient to found jurisdiction, for the parties having entered into it in Scotland, are presumed to have had the law and the courts of Scotland in view; but to any action arising out of it, it is necessary that the foreigner shall be personally cited, if he has not resided in the country for that period which constitutes domicile. A jurisdiction thus founded is said to arise *ratione contractus*.

Ratione delicti.—On account of the delict. The commission of a crime or delict vests the judge, within whose territory it has been committed, with an exclusive jurisdiction *quoad* it. He may try the offender, and punish him according to the law of the land where the offence was committed. A foreigner thus committing a crime in Scotland, is amenable to the criminal jurisdiction of Scotland, and to no other; for, if he should escape, he cannot be put on trial or punished for his crime in his own country. Erskine gives the reason for founding criminal jurisdiction against the delinquent in the place where the crime has been committed, in the following passage (B. 1, T. 2, § 23): "This appears to be the most natural and rational course of criminal trials, because those under whose eye the offence was committed will be most effectually deterred from a wicked course of life, by seeing the criminal also punished; and the just resentment of the person injured, and his friends, will be most amply satisfied." See *Locus delicti*.

Ratione domicilii.—On account of domicile. Domicile is

the basis on which civil jurisdiction is most frequently founded; it subjects the person to the jurisdiction of the judge in whose territory he resides, and reasonably so, since he at the same time enjoys the protection of that judge.

Ratione incidentiæ.—By reason of the incidence; on account of being incidentally connected with. Ersk., B. 4, T. 4, § 46.

Ratione originis.—On account of one's origin or birth. It was at one time supposed that the jurisdiction to which one was rendered amenable by the fact of his birth, and which vested in the judge of the territory in which he was born, was one which attached for ever, and could not be voided, even by departure from the place of nativity *animo remanendi;* and Erskine, in treating of this says: "The reason of which decisions seems to be, that those who are born within the kingdom, though they should be afterwards settled abroad, without an intention of returning home, cannot shake themselves loose from the obligations naturally due by them, either to the laws or to the courts of their mother country." This doctrine, if ever purely held, has been exploded, except, possibly as regards the exceptional case mentioned by Lord Kames, of a man being guilty of treasonable practices against the Sovereign of his native land, who cannot plead his departure from his country as freeing him from the natural loyalty due to his sovereign. Reference may be made to note 28, by Lord Ivory, appended to Erskine, B. 1, T. 2, § 19, in which he fully reviews the decisions upon this point of law.

Ratione privilegii.—On account of privilege. Formerly, members of the College of Justice were only amenable to the jurisdiction of the Supreme Courts, and therefore could decline the jurisdiction of any inferior judge on account of their privilege. Such privilege has been abolished, and no similar privilege now exists but that which a nobleman has, of declining to be tried on a charge of treason before any other judicatory than the House of Lords.

Ratione rei sitæ.—On account of the position of the subject or property. A foreigner is subject to the jurisdiction of the Scotch courts, if he has either heritable or moveable property situated in Scotland. In the case of moveable property, which may be removed from the jurisdiction, arrestment of it for the special purpose of founding jurisdiction, is necessary

before the foreign owner of it can be called upon to answer to any action raised against him in the Scotch courts. No antecedent procedure, such as arrestment, is necessary, where the subject is heritable. See *Arrestum*, &c.

Ratione suspecti judicis.—On account of the judge being suspected. A judge may be declined where, from his personal interest in the issue of the suit, or his relationship to either of the parties, he might be disposed to favour one of them, and deal partially. Such a declinature on the part of a suitor is unknown in practice; but the judges, in cases where the declinature might be urged, are in the habit of declining to adjudicate therein *ex proprio motu*.

Re, verbis, literis, consensu.—By the thing, by words, by writing, by consent. Contracts were divided among the Romans into four classes, according to the manner in which they were constituted, namely, into real, verbal, literal or written, and consensual. Regarding the constitution of the different contracts, see *Obligatio literarum*.

Rebus integris.—Matters being complete. Where a bargain or contract has been entered into, but nothing done in consequence of or in dependence upon it by the parties, matters are said to be complete, so that either of them may resile: the parties are still in the positions respectively occupied by them before contracting. If, however, *rei interventus* has followed upon the contract, the parties are barred from resiling, because *res non est integra*. The rule by which it is judged whether matters are or are not complete is this: whenever anything has taken place on the faith of the bargain or agreement, which cannot be recalled, and parties put in the same position as before, then it is understood that matters are not complete, and there is no longer *locus pœnitentiæ*. Thus, where two parties enter into an agreement regarding the conveyance of land, either may resile before they have entered into written missives, or before the conveyance is completed. But if, on the faith of the agreement, possession has been given, or the price paid, or improvements executed, &c., *res non est integra*, and neither can resile. A mandatory may resign his office after acceptance of it *rebus integris*, that is, provided he has not already executed part of the acts, performance of which are authorised by the mandate; but if he has entered upon the

office, and performed part of the duty, he cannot resign without consent of the mandant until he has fulfilled the whole.

Rebus ipsis et factis.—By the facts and circumstances themselves. Consent to marriage is sometimes inferred from facts and circumstances, as where the parties are habit and repute husband and wife, and address each other by these names respectively.

Receptator.—A resetter; a receiver of stolen goods.

Reddendo.—That clause in a charter which sets forth the payment to be made or service to be rendered by the vassal to the superior, in return for the lands held by the former of the latter. It follows the *tenendas*, which expresses the nature of the tenure by which the lands are held. The name is taken from the first word in the clause, as it stood in the old latin form.

Regalem habens dignitatem.—Having royal dignity. Ersk., B. 2, T. 5, § 64.

Regalia.—Royal rights pertaining to the Crown; things belonging to the Sovereign. The rights of the Sovereign which pertain to the Crown, apart from those enjoyed as an individual, are divided into *regalia majorá* and *regalia minora*. The former include those rights which are inseparable from the person of the Sovereign, such as the prerogative of pardoning criminals; the latter consist of those rights attached to the Crown, which may be conferred by gift, or otherwise, upon a subject, such as salmon-fishings, forfeitures, casualties of superiority, &c.

Regiam Majestatem.—The books of the Majesty; the title given to a collection of ancient laws, said to have been compiled by the order of David I. king of Scotland. Its authenticity as a Scotch performance on the order of King David is seriously doubted, many learned writers inclining to the opinion that it is a compilation from the ancient laws of England made under Edward I., "with the artful design (as Sir Walter Scott thinks) of palming upon the Scotch Parliament, under the pretence of reviving their ancient jurisprudence, a system as nearly as possible resembling that of England." A reference to the different writers who have taken part in this controversy will be found in Bell's Dict., *h. v.*

Rei depositæ proprietas apud deponentem manet; sed

et possessio.—The right of property in a thing deposited remains with the depositor, and also the possession. Deposit is either proper or improper.—1. Proper, where the subject is deposited for mere preservation, and to be specifically returned, as in the case of plate lodged with a banker for greater security; in such case, according to the above maxim, the right of property in the deposit never passes from the depositor, and he may vindicate his right to the *ipsum corpus* at any time. 2. Improper, where fungibles are deposited for the return of an equal quantity, as money with a banker, where the property in the deposit is transferred to the depositary, and the depositor becomes a mere creditor. In the latter case the present maxim does not apply.

Rei interventus.—The intervention of a thing or act. *Rei interventus* is the technical name given to any act done in consequence of or on the faith of a hitherto uncompleted bargain, the effect of which is to bar objection on the ground of the bargain being incomplete, and to take away the *locus pœnitentiæ*. For cases illustrative of this, see *Locus pœnitentiæ. Rebus integris.*

Rei persecutoriæ.—The name given to a class of actions under the civil law, and explained *supra*, page 9.

Rei suæ providus.—Careful of his property, or prudent in its management. Interdiction, whether voluntary or judicial, can only be recalled or removed by an interlocutor of Court, and it affords a good ground on which to apply for the removal of the restraint imposed by interdiction, that the interdicted has become *rei suæ providus.*

Rei vindicatio.—An action under the civil law by which the owner of a subject claimed the subject itself; a real action, as opposed to *condictio*, which was a personal action under which delivery of the thing itself could not be enforced, but its value might be recovered. The *vindicatio* was only competent to the true owner against the possessor for the time being. For an illustration of the application of this action in the Scotch law, see Ersk., B. 3, T. 3, § 34. See *Condictio.*

Reipublicæ interest ut sit finis litium.—It is for the public interest that there should be a known termination of pleas; *i.e.*, a termination beyond or after which the decision in a suit should be final and unquestionable. "The Lords

have never reduced or altered their decreets upon alledgeances, either in fact or law, which were proponed and repelled therein; and if they should so do, there could be no end of pleas. For if they could alter the first time, by admitting that which they did repel, or by repelling that which they did sustain, there is nothing could secure the lieges, but that they would return again to their first judgment, and back from that to the second, without end; and thereby no man could, with security and confidence, call anything his own; therefore custom hath so secured that point, "proponed and repelled," that it is an unbrangeable foundation of all the securities of the nation. All nations have been earnest and anxious that there might be a known termination of pleas." (Stair, B. 4, T. 1, § 46.) The phrase may also mean that it is for the public interest that there should be a fixed and determinate time beyond which a right of action should cease; and upon this ground action is with us denied for a debt or on an obligation which is not brought within forty years. Various reasons combine to make this rule not only politic but just; for after a period of forty years all those persons may have died, or all trace of them lost, who could have supported the case of the defender, and rebutted the claim of the pursuer; the witnesses for the pursuer after such a period, would in all probability speak from mere recollection, and the proof thus afforded by them would amount more to a proof of indistinct impressions than to a proof of facts—a kind of proof on which it would be hazardous to disturb rights which had remained undisturbed for forty years.

Reipublicæ interest, voluntates defunctorum effectum sortiri.—It is for the public interest that the wills of deceased persons should receive effect. In construing a testament or will, the intention of the testator is that which is chiefly regarded, and in questions arising out of them, the Court in every case gives effect to this where it can be ascertained. The Court will not, however, adopt that as the testator's intention which is not warranted by the terms of his deed, even although he should have used words and clauses in ignorance of their legal effect, the mere use of such terms raising a presumption of knowledge on his part of their technical meaning and effect.

Relegatio.—Banishment. The *relegatio* of the civil law was much similar to the punishment of transportation formerly imposed under our law on criminals. It was rarely a perpetual banishment, and did not deprive the exile of his citizenship (*civitas*), nor of his rights as one of a family (*familia*). In this respect it differed from deportation, under which the condemned lost all his civil rights, and even when recalled, was only restored to his civil rights for the future, unless in the special case where the emperor granted absolute restitution (*per omnia*), which had the effect of reinstating him in his original position.

Rem pupilli salvam fore.—That the pupil's estate will be preserved or uninjured. All tutors, except those appointed by the will of the pupil's father (testamentary tutors) require, on entering upon their office, to find caution for their intromissions with the pupil's estate, and that they will act faithfully in the performance of their duties as tutors. Testamentary tutors are exempt from this, "because the confidence which the father places in them by the nomination, creates a presumption that he was well assured of their probity and diligence." Ersk., B. 1, T. 7, § 3.

Remediis prætoriis.—By prætorian remedies. Those were termed prætorian remedies under the civil law which arose from the provisions of the Prætor's Edict, and had no place in the strict civil law. Thus the *bonorum possessio* was the prætorian remedy under which a child was enabled to succeed to its father, where, by the *capitis diminutio* or otherwise, he was by the strict law rendered incapable of succeeding. All the prætorian interdicts, and many of the exceptions pleadable in defence to an action, were of the class of prætorian remedies.

Remedium extraordinarium.—An extraordinary remedy; one out of the usual order of legal remedies, and not resorted to except in cases of great necessity.

Remissio injuriæ.—Forgiveness of the offence; condonation. It affords a good defence to an action of divorce on the ground of adultery, that the injured spouse was fully aware of the other's unfaithfulness, and in such knowledge forgave the offence. Such forgiveness, or condonation as it is most frequently termed, may either be express, as in the case

where a verbal or written forgiveness is given; or implied, as where the injured spouse continues to cohabit with the adulterer after knowledge of the offence, or delays raising an action of divorce for a period so lengthened as to import acquiescence. When adultery was tried criminally, the forgiveness of the injured spouse did not exempt the adulterer from punishment; but as that offence gives rise now only to the civil remedy of divorce, it may, like all other civil rights, be abandoned or discharged.

Remotis testibus.—The witnesses being absent. Ersk., B. 3, T. 2, § 7.

Renovatio.—A renewal. In treating of the rights which churchmen had over their lands, Erskine mentions that no clergyman could dispone any part of the lands of his benefice without the consent of his bishop and the majority of the chapter; but, he adds, "this incapacity did not strike against their power of receiving the heirs of vassals; for, though the entry of heirs be a *renovatio*, it is not an *alienatio feudi*." (B. 2, T. 10, § 5.) The distinction here taken is between a mere renewal, in a feudal sense, of a grant already made; and a new disposition or original grant of benefice lands. The one act was within the power of the holder of the benefice, because it did not in any degree impoverish or lessen its value; while the other, as it affected the church generally, being a conveyance of church lands, and also affected whoever should subsequently succeed to the living, could only be done by the holder with consent of the bishop and majority of the chapter in that see.

Reo absente.—The defender being absent.

Reo præsente.—The defender being present.

Res aliena.—The property or subject belonging to another.

Res aliena scienter legata.—A subject bequeathed by a testator in the knowledge that it does not belong to him, but is the property of some other. When a testator bequeathes what he knows does not belong to him, his executor is bound to make good the legacy to the legatee, either by purchasing and delivering the thing itself, or where this cannot be done, by paying him the value of it. A different rule prevails where a testator bequeaths a subject belonging to another,

under the erroneous belief that it is his own; in such case the legacy falls.

Res communes.—Common things; defined in the civil laws as things the property of which belongs to no one, but the use to all, such as air, light, running water, &c.

Res fit inempta.—The subject is regarded as unbought. Where the *pactum legis commissoriæ* is attached to a contract of sale, the contract becomes void, and the subject regarded as never having been bought, if the price is not paid by the day fixed upon. The seller can then recover the subject if it still remains in the hands of the purchaser, but if it has passed into the *bona fide* possession of others, he has only a personal action for the price.

Res gesta.—The thing done; the whole transaction or circumstance. This phrase, which is of very frequent occurrence, signifies not only an act performed, but everything said or done at the time bearing upon or having reference to it. Thus, it includes all statements made immediately before or immediately after any particular act, so nearly connected with it in point of time as to be inseparable parts of the whole transaction, and incapable of omission from any narrative or testimony professing to be an account of it. Statements offered in evidence, which would otherwise be excluded as hearsay, are received when they form part of the *res gesta*, and the following passage from Hume in support of this doctrine may be given as an illustration of that which this phrase is held to include. He says (Vol. II., 406, note):—"Very often words uttered to a witness are a substantial point of the *res gesta* told by such witness; are the cause and motive why the witness himself has proceed to do a certain thing; and h cannot relate truly and intelligently what he did, without mentioning why and how he came to conduct himself in that way. Put the case that John finds James lying wounded and bleeding on the highway, and James tells John that he has been fired at with a pistol and robbed, and that the robber is dressed so and so, and has robbed him of such and such articles, and has gone off by such and such a road. Now here, if John in consequence pursues by that road and takes a man dressed as has been told him, and on a search the articles mentioned and a pistol bearing marks of being

recently fired are found on him, certainly this verbal information from John is a link and circumstance of the fact, is an act in the progress of the business, and equally admissible as the rest of the story." In this case, John's *act* was to run after and apprehend a certain man, but the information on which he proceeded, (although of the nature strictly of hearsay as evidence,) the intention and motive on which he acted, all form constituent parts of his whole interference in the matter; they are all parts of the *res gesta*. Reference may be made farther on this point to Dickson on Evidence, §§ 92, 1381.

Res integra.—The matter is entire or complete. In certain cases, parties may resile from agreements entered into, so long as *res integra, i.e.*, so long as the matter remains on the mere agreement, and nothing has been done by either party in consequence of and in dependence upon it. But if any act has followed upon the agreement, then *res non est integra*, and resiling is barred. See *Rebus integris*.

Res inter alios acta, aliis neque nocet, neque prodest.—A transaction between certain parties cannot advantage or injure those who are not parties to that transaction. A co-debtor thus cannot be affected by the admissions or pleas of his co-debtor in an action founded on their joint obligation, but to which he has not been called as a party; nor does the decision in that action render the question as between him and the creditor *res judicata*. On the other hand, while he cannot be injured by that decision, neither can he be advantaged by it. So, again, where a creditor inhibits his debtor, he alone can take advantage by the inhibition; for should the debtor alienate his lands notwithstanding the inhibition, it is a good and valid conveyance if not reduced by the inhibiting creditor. The inhibition being a *res inter alios acta*, cannot be pleaded by any of the inhibiter's co-creditors, who are third parties. The effect of all legal process is regulated by this maxim, it cannot injure, but neither can it avail any who were not parties to it.

Res judicata.—A thing decided; a final judgment. A point or question becomes *res judicata* when it has been so decided by the Supreme Court as conclusively to settle it, and so as to prevent the same question being again raised by

the same parties or their representatives; but there can be no *res judicata* so long as the decision is subject to review. This plea when stated and substantiated in a defence, prevents the judge from inquiring into the merits of the case. Such final decision cannot affect others than those who were parties to the action in which it was pronounced, except in so far as that decision constitutes a precedent.

Res judicata inter alios, aliis neque nocet neque prodest.—A question finally settled between certain parties can neither injure nor benefit others. See the observations on the two preceding phrases.

Res judicata pro veritate habetur.—A thing decided is held as true; the rule, according to Erskine, that all final sentences are considered in law as grounded upon truth and justice. This maxim has universal application within the country in which the judge who pronounces the decision has jurisdiction; his decision must be taken as sound and just, and cannot be inquired into. But "where the obtainer of a decree given forth in one state demands the execution of it by an action brought before the Court of another state, that Court, who are not bound to interpose their authority to it *ex necessitate*, but only *ex comitate*, have a right, previously to their interposition, of inquiring into the merits of the question in dispute, that they may form a judgment, whether there be sufficient ground, either in law or in equity, for awarding execution upon the decree." Ersk., B. 4, T. 3, § 4.

Res litigiosa.—A subject which has been rendered litigious by having been made the subject of a lawsuit. See *In rebus*, &c.

Res meræ facultatis.—A matter of mere power; a mere faculty. Such, for example, is the right which a proprietor has of building upon his own property, or which any one has of walking upon the sea-shore, or sailing upon the sea, or on any navigable river. It is a right which may or may not be exercised at the pleasure of him who holds it; and such rights are never lost by their non-exercise for any length of time, because it is of their essential character that they may be used or exercised at any time. See *In iis quæ*, &c.

Res non est integra.—The matter is not entire or complete. See *Rebus integris*.

Res nullius.—A subject which is the property of no one. There are two distinct classes of subjects included in the name *res nullius*, those, namely—1, which are in their original state, and have never had an owner; and those, 2dly, which have belonged to some one who has lost or abandoned their possession. Subjects of the first class, such as pebbles on the sea-shore, wild animals, fish in the sea, &c., belong to the person who first finds or captures them, by the title of occupancy; but those of the second class, such as abandoned heritable rights, treasure trove, (which consists of coin, gold, silver, plate, &c. hidden in the earth, the owner of which is unknown,) belong to the sovereign. In England, things found on the street or road and not hidden in the earth, belong to the finder; but with us in theory a different rule prevails; in practice, however, our rule is the same, the subject so found becoming the property of the finder if, after due public inquiry by advertisement &c., the owner cannot be found. But if property found on the street or highway be appropriated by the finder without any attempt being made on his part to discover the true owner, such appropriation constitutes the crime of theft. There is this difference to be observed between the right which an occupier has to that which had never been appropriated before taken possession of by him, and the right which a finder has to a subject lost by its true owner, that the mere occupancy in the former case gives an indefeasible right to the subject occupied, while in the latter the true owner may recover his lost subject from the finder any time within the years of prescription. *Res nullius* among the Romans signified those subjects which were not and never could be the property of any one, such as things consecrated to God, temples, the ground on which they were built, burial-places, &c. See *Quod nullius*, &c.

Res perit suo domino.—A thing perishes to its owner. The meaning of this maxim is, that the loss consequent upon the deterioration or destruction of a subject must be borne by the owner, unless such loss has been occasioned by the fault of another. Thus, when a subject is hired out, any deterioration it may suffer, or its total loss, falls upon the owner and not upon the person hiring it, so long as the hirer uses it for the purposes for which it was hired, and (if not destroyed;

returns it on the expiry of the stipulated period. All accidental loss falls upon the owner. This maxim has been explained in the House of Lords to mean, that the interest which each has in a subject, perishes to the *dominus* of that interest, as well as the corporeal thing to its *dominus*. *Bayne*, 3d July 1815. 3 Dow. 233.

Res publicæ.—Subjects belonging to the public; property of public right. Such are the seas, sea-shores, navigable rivers, highways, harbours, &c., which are exempted from commerce, and either belong to the public, or are vested in the Sovereign for behoof of the community.

Res religiosa.—Sacred things. Among the Romans, any sepulchre or burial place was regarded as sacred, and was exempted from commerce. With us the phrase includes all things which have been consecrated or set apart for the service of God, such as churches, communion-cups, &c.; and these are exempted from commerce, and cannot be applied to the uses of private property while they continue in that state. Under certain circumstances, they may, however, be disposed of, and others substituted for them; regarding which see Ersk., B. 2, T. 1, § 8.

Res sua.—One's own property.

Res sua nemini servit.—No one can have a servitude over his own property. The owner of a subject cannot have a servitude over it, because that, being a minor right, is merged in his paramount right of property, and all his acts in reference to the subject, or the uses to which he puts it, are attributed to this paramount right. So, if the servient owner should acquire the dominant tenement, the servitude previously existing is extinguished *confusione;* and Erskine lays it down, that "a servitude thus extinguished revives not, though the right of the two tenements should be again divided, unless the servitude be constituted *de novo*." (B. 2, T. 9, § 37). Bell objects to this doctrine as being too broadly stated, and observes, "that if, in the exercise of the right, or otherwise, the owner has indicated no intention of extinguishing the servitude, it would, on separation of the tenements, revive." Bell's Prin., § 997.

Res universitatis.—Subjects belonging to a corporate body, such as a borough, an hospital, a university, &c.

Rescripta.—Rescripts. One of the kinds of imperial ordinances or constitutions under the civil law; by these the Emperor gave instructions for the decision of some case which had arisen, and which had been referred to him for instructions. See *Decreta.*

Resoluto enim jure dantis, resolvitur jus accipientis.—The right of the giver having ceased, or become void, the right of the receiver ceases also. The right of an assignee is only co-extensive with that of the cedent, and therefore any defect or limitation in the title of the former attaches to the title of the latter. So, if a liferenter assigns the benefit of his liferent, on his death all the right of the assignee ceases, as the period of his life was the limit of the cedent's right. "Though a donation between man and wife," says Erskine (B. 1, T. 6, § 32), "is not null, yet the donee holds it under the tacit condition, that it shall fall in the case of revocation; so that the donee's right continues pendent upon the donor's will during his life. The donee cannot therefore alienate the subject, nor charge it with any burden to the prejudice of the donor; and consequently the donor returns, upon his revocation, to the full property of the subject, free from the consequences of all the intermediate deeds granted by the donee, even to his creditors or singular successors." In such case the donee's right having ceased by revocation, all the rights he or she have granted *quoad* the donation also cease.

Respondeat superior.—Let the master answer, or be responsible. According to this maxim a master is responsible for the acts of his servant committed or done in the performance of his master's orders, or in the course of the ordinary employment for which he was engaged. The master's liability proceeds upon the ground that, as he has the selection of those admitted to his employment, he ought to be responsible for the results, if, through want of due inquiry or otherwise, he selects an unfit or improper person. He is thus, as it were, only made responsible for his own want of care. A master, however, is not responsible for the injury inflicted by his servant upon a fellow-servant engaged in the same common employment. See *Qui facit,* &c.

Respondentia.—The name given to a security granted over the cargo contained in a ship for a loan advanced in con-

templation of a particular voyage. It is of the same nature as bottomry, only in bottomry the security is granted over the ship itself. If the cargo perishes through the perils of the sea, or superior force of an enemy, the lender loses all claim for the repayment of his money; and in consideration of the risk thus undertaken, he was allowed a higher rate of interest than usual, which got the name of *fœnus nauticum*, or marine interest.

Restitutio in integrum.—Entire restitution; restoration to one's former condition. A minor is entitled to entire restitution against all acts done by himself, or others on his behalf, during his minority, which have been to his lesion. The effect of such restitution is to place him in the same position *quoad* each particular transaction, as if it had never been entered into. This right must be judicially claimed by the minor, by challenging the deed or transaction complained of before the expiry of the *quadriennium*—the four years following his attaining majority—otherwise his claim to restitution is barred.

Retenta possessione.—Possession being retained. An assignation of moveables without delivery was formerly of no effect whatever in passing the property of the subject assigned to the assignee; the possession being still retained by the cedent, and he being thus the ostensible owner of the subject, his creditors were entitled to use diligence against it as if it were his own. The absolute character of this rule has been somewhat relaxed, and its rigour abated, by the provisions of the Mercantile Amendment Act, which provides that subjects sold but not delivered are, notwithstanding, to be regarded as the property of the buyer. It is thought, however, that the provisions of this Act refer only to what are strictly commercial transactions; and it may be seriously doubted whether it would be held to affect those private, and frequently collusive transactions, to which this rule has most frequently to be applied. An illustration may serve to explain the distinction pointed at. If a furniture dealer should sell certain articles of furniture to a purchaser, who desired that they should remain in their then position until he was ready to take them away, and in the meantime, before actual delivery, the furniture dealer should become bankrupt, such furniture

would doubtless be held to be the property of the purchaser: this being precisely the nature of the case provided for by the Statute. But if a householder in pecuniary difficulties sold or assigned his furniture to a person who advanced to him the value of it, but no delivery was given or taken of the furniture by the creditor advancing, it is very doubtful whether, on the bankruptcy of the householder, the whole body of his creditors would not be entitled to claim the furniture as a part of their debtor's available estate, and whether, as in a question with them, the previous assignation would avail the assignee anything, or give him a preference to the furniture over the other creditors. The case here supposed is not in the proper sense a *res mercatoria*, and does not seem to fall within that class of transactions which the Statute was intended to protect. In the former case, the creditors knew from the nature of their debtor's business that he might be placed in the position supposed, and therefore they calculated, or are supposed to have done so, upon such an event in giving him credit. In the other case, the creditors were entitled to rely upon the ostensible and reputed ownership of their debtor, and cannot be defeated by a private arrangement, which may be *bona fide*, but which, on the other hand, may be collusive. Except in so far as altered by the above-mentioned Statute, the rule is still in observance and force, that possession in moveables implies property, and that mere purchase or assignation, without delivery, does not convey the right of property, but merely constitutes the assignee a creditor, in a question with other creditors of the cedent.

Retractus feudalis.—A recall of the feu; or (as used in Erskine, B. 2, T. 12, § 27) more correctly, a re-purchasing of the feu right. This was the privilege which a superior had of paying off the debt due to the appriser or adjudger of his vassals' lands, and taking a conveyance to the adjudication in his own favour. Where the debt exceeded the value of the lands, the superior was only bound to make payment to the extent of the value in return for the conveyance; and this privilege he could only exercise before the expiry of the legal. It is a privilege now unknown in practice.

Retro.—Backward. Some Acts have, as regards their legal consequences, a retrospective effect. Thus the sub-

sequent marriage of their parents has the legal effect of legitimating illegitimate children as from the date of their birth; the subsequent confirmation of a disponee's sasine who holds upon an alternative holding, has the effect of confirming that sasine as from its own date; and where a disponer's title is invalid or defective at the time of granting the disposition, and is afterwards validated by a supervening right, that supervening right accrescing to the disponer, validates his title as from the date of its being granted. All these are said in legal phraseology to operate *retro*.

Reus.—Defender or defendant. *Actor.*—Pursuer or plaintiff.

Rex nunquam moritur.—The Sovereign never dies. See *Collegium*.

Rex statuit per commune concilium.—The King has enacted by his Common Council. Ersk., B. 1, T. 1, § 38.

Ripæ muniendæ causa.—For the purpose of fortifying or protecting the bank of the river. A navigable river being public property, no one is entitled so to build upon its banks as to obstruct the navigation, or the right of the public to walk there. But a riparian proprietor may build upon the bank, for the purpose of fortifying or protecting it, where a change in the channel from natural causes, threatening an encroachment on his lands, becomes imminent, or where, from a flood or otherwise, he has reason to apprehend damage to the banks and to his adjoining property. Even in such cases, however, his operations must not interfere with the navigation of the river, or obstruct the enjoyment of the public rights.

Rustica et urbana.—Rural and urban. Prædial servitudes are subjected to this division, rural and urban: the former including all the servitudes affecting the soil, although the land burdened should be situated in a city—such as right of way, pasture, aqueduct, &c.—and the latter, all servitudes affecting buildings, although they should be situated in the country—such as stillicide, *oneris ferendi*, &c. "It is not the place, but the matter and use of the tenement which makes this distinction; and for this reason, dwelling-houses and offices built for the use of a farm are the subjects, not of city (urban) servitude, but of rural." Ersk., B. 2, T. 9, § 6.

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Sacramenta puberum sunt servanda.—The oaths of minors are to be kept inviolate. On the principle of this maxim minors were barred, according to the rules of our older law, from challenging or repudiating any deed or transaction entered into or granted by them during their minority, which they had sworn never to call in question. As minors, however, could as easily be induced to ratify upon oath obligations undertaken by them to their lesion, as they could be induced to grant them, this rule has long been abolished, and by the Act 1681, cap. 19, the elicitors of such oaths were declared infamous. By that Statute it was made competent to any kinsman of the minor to pursue an action for setting aside such transactions, lest the minor should be indisposed to sue for reduction in his own name of a deed or transaction which he had sworn never to question. The minor himself is the only person now entitled to sue such an action, unless he should die within the *quadriennium*, in which case the right of action transmits to his heir.

Salva substantia.—The substance being saved; the subject being preserved without being diminished. The right of a liferenter is only to the fruits, profits, or revenues of the subject liferented, and he cannot encroach upon the capital of the subject itself. He cannot do anything by which the subject may be endangered or deteriorated in value, except in so far as the deterioration may arise from the mere tear and wear of ordinary use to which his liferent entitles him. A right of liferent, therefore, cannot be constituted in a subject which necessarily perishes in the use; it must be a subject which can be used *salva substantia*.

Salvam fecit totius pignoris causam.—He furnished the means of saving the whole pledge, or subject on the security of which the loans were granted. (Bell's Prin., § 456.) It is upon this ground that the bottomry creditor whose bond is last in date is preferred to others holding bottomry bonds over the same ship, contrary to the ordinary rule *prior tempore potior jure*. To his loan is to be attributed the safety of the common subject of pledge; because, but for the money advanced by him, the ship, remaining unseaworthy, would have perished on the voyage. He having thus afforded the means of preserving the pledge for the benefit of other creditors as well as himself, is preferred.

Salvo jure cujuslibet.—Saving or reserving the right of all others. This is frequently found in charters of confirmation, and its effect is to reserve to the superior and all others whomsoever, their rights in or concerning the lands confirmed, in so far as those rights might otherwise be prejudiced by the confirmation. In the case of *Forbes*, M. 6517, it was held in respect of this clause, that a superior, by granting confirmation, was not thereby precluded from the benefit of inhibition affecting the property which he had previously used. This clause does not, however, reserve the superior's right to casualties or duties due at the time of confirmation; these must be expressly reserved, as the delivery of a charter by progress presumes the discharge of all prior casualties and duties. In almost all the later Scottish Parliaments, the last Act of the Session was generally one entitled, *Act salvo jure cujuslibet*, the purpose of which was to secure the rights of third parties against the effects of private acts or ratifications.

Sanæ mentis.—Of sound mind.

Sancire.—To confirm; to forbid under pain of punishment. "That part of the law which inflicts the punishment upon disobedience is called its *sanction*, from *sancire*, to confirm; because it is that which gives the enactment full force and authority, and chiefly preserves it from being violated by perverse men, who would disregard the true grounds of obedience." Ersk., B. 1, T. 1, § 5.

Sapiens naturam delicti.—Partaking of the character or nature of a delict.

Sciens et prudens.—Wittingly; in full knowledge. "If one who makes a gratuitous grant shall, *sciens et prudens* (*i. e.*, in the full knowledge of what he is doing, intentionally), bind himself in absolute warrandice, he ought both in law and equity to be tied by his obligation." Ersk., B. 2, T. 3, § 27.

Scire debes cum quo contrahis.—You ought to know with whom you contract. See *Nam scire*, &c.

Scire et scire debere æquiparantur in jure.—To know a thing, and to be bound to know it, are regarded in law as equivalent. Ignorance of the law does not excuse any violation of it, because every one is bound to know the law of the place where he resides; and this obligation to know is regarded as equivalent to actual knowledge, Thus an Englishman coming to Scotland and commencing business as a spirit-dealer, would not be exempted from the penalties incurred by a violation of the Public Houses Act, on the ground that no such law prevailed in England, and of his ignorance of its existence here. He is bound to know the law, and would be held as knowing it, in any prosecution which might arise out of his violation of its provisions.

Scripto.—By writing. A proof *scripto* is a proof by written documents. See observations on following phrase.

Scripto vel juramento.—By writ or oath. In some cases the law allows a party to prove his case only in this limited manner by the writ or oath, namely, of his opponent. Thus, a debt which has undergone the triennial prescription, can only be proved by the writ or oath of the alleged debtor; the resting-owing of borrowed money can only be proved in like manner; and the existence of an alleged trust, as in a question between the truster and trustee, can only be proved (according to the provisions of the Act 1696, cap. 25) by the writ or oath of the latter.

Se defendendo.—In defending one's self; in self-defence. Every one is entitled to defend his life in the way most likely to secure that end, whenever it is in danger through the violence of others. Even homicide is justifiable, and infers no punishment, where a person in the necessary defence of his own life, kills one who has attacked him; but, to justify such a proceeding, it is necessary to show that there was no other way of escape except by the death of the assailant. A woman

is entitled, in defence of her chastity, to kill a man who attempts to commit a rape upon her, if there be no other way of escaping from the threatened violence.

Secundum allegata et probata.—According to that which has been alleged and proved. The decision, in every case, must proceed upon the allegations of the parties, and the proof adduced in support of them, and not upon the private knowledge of the judge, however accurate and extensive that may be. A decision, which is not in terms of the conclusions of the action, may be overturned on review, or reduced upon that ground; and this holds especially in regard to decisions which award more than that concluded or prayed for.

Secundum bonum et æquum.—According to that which is good and equitable.

Secundum chartam conficiendam.—According to a charter to be granted. See *Secundum tenorem*, &c.

Secundum legem domicilii, vel loci contractus.—According to the law of the domicile, or of the place where the contract was entered into. See *Lex domicilii. Lex loci*, &c.

Secundum materiam subjectam.—According to the subject matter.

Secundum tenorem chartæ confectæ.—According to the tenor of a charter already granted. In the earlier stages of feudal conveyancing, the vassal was most generally infeft upon a precept granted by the superior for that purpose, before the charter was executed which conveyed the lands. In such case the precept of sasine or possession bore to be "according to the terms of a charter to be granted;" and such precept was of itself a valid title when followed by possession. Where the precept of sasine was granted with reference to a prior charter of the lands, it bore, in the words of the phrase, to be "according to the tenor of a charter already granted." See Duff's Feud. Con. 43.

Secundum vires hereditatis.—According to the extent of the succession; that is, the value of the estate succeeded to. The liability of an heir for the performance of his ancestor's obligations and payment of his ancestor's debts, is not measured by the extent of the succession, when he enters as heir simply, and without adopting any of the modes prescribed in law by which his liability may be so limited. If the heir enters upon the succession generally as heir, he is liable for

the whole of his ancestor's debts and obligations, however inadequate his ancestor's estate may be to meet them; but he may restrict his liability by serving heir with the benefit of specification.

Secundum vires inventarii.—According to the extent of the inventory. An executor who makes up his title to a deceased person in the usual form, and gives up an inventory of the whole of the deceased's moveable estate to the Commissary, is only liable for the deceased's debts to the extent of the value of the estate so given up. But where an executor intromits with the moveables of the deceased without giving up an inventory to the Commissary, he renders himself liable *in solidum* for the deceased's debts, however these may exceed the value of the deceased's moveable estate. See *Beneficium inventarii.*

Sede vacante.—The benefice being vacant. Stair, B. 4, T. 24, § 7.

Semel baro semper baro.—Once a baron always a baron. To entitle an heir to claim heirship moveables, it is necessary that his ancestor should, at the time of his death, be a baron, a burgess, or a prelate: every one being considered a baron in this matter who, at his death, was vest and seised in lands, houses, or annual rents forth of land not being a mere liferent. If the ancestor was infeft during his life, the presumption, as expressed in the phrase, is, that he was undenuded, and therefore a baron at the time of his death, and that heirship moveables are consequently due to the heir. The effect of this presumption is to throw the burden of proving on the person opposing the heir's claim; but it may be elided by a contrary proof.

Semel civis semper civis.—Once a burgess always a burgess. This is not presumed, and therefore it lies upon the heir claiming heirship moveables, on the ground of his ancestor being a burgess, to prove that he was so at the time of his death.

Semel prelatus semper prelatus.—Once a prelate always a prelate. See observations on preceding phrase, which apply also to this.

Semiplena probatio.—A half proof. In actions of filiation, a pursuer was formerly entitled, on adducing a *semiplena probatio,* to her oath in supplement to prove that the defen-

der was the father of her child. A *semiplena probatio* was such a proof as induced, not merely a suspicion, but a reasonable belief that the pursuer's case was well-founded, and consisted generally of a proof of opportunity for connection, acts of familiarity on the part of the defender towards the pursuer, &c.; in addition to this, the pursuer was entitled, as already mentioned, to her oath in supplement to complete her proof, because in such cases it was rarely possible to obtain direct evidence of the alleged connection, except from the woman herself. The leading case on this point is that of *Craig*, 14 June 1809, F. C. This kind of proof is not now recognised, since the pursuer in such an action, under the recent Evidence Acts, is entitled to adduce herself as a witness in support of her own case; and, in judging of the proof, the Court will not consider whether, without the woman's own evidence, there is what would formerly have been held a *semiplena probatio*, completed by the woman's oath, but will decide upon the whole case as presented by the record and proof, as they would in any other kind of action. *M'Bayne*, 10 Feb. 1860.

Senatus-consultum.—A resolution of the Roman Senate, having the force of law, and forming one of the great sources of the civil law. There is a difference of opinion among historical writers as to whether the Senate had the power of directly enacting laws during the period of the republic; but there is no question that they exercised this power in the time of the Emperors. Justinian, in his Institutes (B. 1, T. 2, § 5), states, as the reason why this power was conferred, that "when the Roman people was so increased that it was difficult to assemble them together to pass laws, it seemed right that the Senate should be consulted in the place of the people." Regarding the historical controversy above alluded to, reference may be made to Smith's Dict., *h. v.*

Sententia contra minorem indefensum lata, nulla est.—A decision pronounced against an undefended minor is null Where a minor is without a curator he is said to be undefended, even although he should appear in the cause and defend it for himself. In such case it is the interest of the party pursuing to have a curator *ad litem* appointed to the minor, as otherwise any decree obtained against him is reducible on the principle of this maxim. A decree obtained against a

minor upon an edictal citation of tutors and curators was reduced, he having had no tutors and curators, and a curator *ad litem* not having been appointed. *Bannatyne*, 14 Dec. 1814. F. C.

Sententia voluntatis.—The purpose or determination of the will. This is the chief thing to be considered in the interpretation of testamentary writings, namely, the purpose or intention of the testator in executing the deed.

Separatim.—Separately; apart from anything already advanced or pleaded.

Separatio tori.—A separation as to the marriage bed. This was all that was allowed to the injured spouse in cases of adultery by the canon law, for marriage being regarded by it as a sacrament, was indissoluble. See *A mensa*, &c.

Separatum tenementum.—A separate tenement; a subject held on a distinct title appertaining to itself. Stair, B. 2, T. 3, § 26.

Seriatim.—One by one; one after the other.

Servitia solita et consueta.—Services used and wont. This was at one time the common return made by vassals to their superiors for lands granted to them; and where special services where not specified, the words of the phrase implied military services.

Servitii præstatio.—The performance of services.

Si aliquid sapit.—If he knows anything; if he is not altogether void of reason. Ersk., B. 1, T. 7, § 48.

Si constet de persona.—If it be clear or certain who is the person meant. See *Falsa demonstratio*, &c.

Si deprehendatur.—If captured. Stair, B. 2, T. 2, § 10.

Si deventum sit ad actum maleficio proximum.—If it approaches an act bordering upon crime. Sir George Mackenzie, in his Treatise on Criminal Law (Part 1, T. 1, § 4), lays it down, that an attempt to commit a crime, if it borders on, or approaches near to the crime itself, should be punished as severely as if the crime had been perpetrated; because such attempt is a lesser degree of that very crime to which it so nearly approaches, and because the state cannot be otherwise secure from the person who has evinced such a wicked and mischievous disposition. Mere attempt to commit a certain crime, although still punishable with us, rarely ever forms the

subject of an indictment, but it is frequently libelled as an aggravation. The attempt to commit murder by the discharge of loaded fire-arms, is sometimes libelled as a substantive charge; and by statute (10 Geo. IV., cap. 38) it is rendered a capital offence, but the prosecutor has the power of restricting the pains of law. In Scotland, capital punishment is now only inflicted for murder, but in England the capital sentence for attempting to commit murder is still carried into execution, as it was in the case of *Martin Doyle*, who was executed for that crime at Chester on 27th August 1861.

Si ingratum dixeris omnia dixeris.—If you affirm that one is ungrateful, in that you include every charge. Ingratitude was recognised among the Romans as a good and sufficient ground for revoking a donation *inter vivos;* and some writers on the feudal law, it would appear from Stair (B. 2, T. 11, § 9), have maintained that ingratitude was a sufficient ground to warrant the superior in revoking his grant, and taking possession of the lands,—an opinion with which Stair does not agree.

Si malitia suppleat ætatem.—If malice supplies the want of age. This phrase occurs in Ersk., B. 1, T. 6, § 2, where, in treating of the invalidity of a marriage entered into by pupils, he says: "The canon law, indeed, affirms, that a pupil may enter into marriage where there is an ability to procreate or conceive; or, as it is expressed by some doctors, *si malitia suppleat ætatem.*" This rendering of *malitia* is very rare. For an explanation of the most usual application of the phrase see *Malitia supplet, &c.*

Si petatur tantum.—If asked only. In blench holdings, where the return for the lands is generally elusory, that return is for the most part due and payable *si petatur tantum;* and this clause, by universal practice, has been interpreted to mean, if asked only within the year (*si petatur intra annum*). If the duty is not demanded within the year, the vassal is not liable for it. Such elusory duties are of themselves of no value, but they reserve the superior's rights to the casualties of relief and non-entry.

Si sine liberis decesserit.—If he shall have died without children. This is an implied condition, borrowed from the civil law, which, in certain cases, our law holds as attached to

mortis causa dispositions of moveable or heritable estate, conveying such estate beyond the disponer's own children. If, at the time of executing the conveyance, the granter should have no children, but after his death a posthumous child should be born to him, the conveyance will be ineffectual to carry the succession past the child, in whose favour it is presumed a new conveyance would have been granted, had its father survived. The same presumption holds, where a father conveys to his child, whom failing, to a stranger, if the child should die leaving lawful issue; for in that case the child's issue would succeed, to the exclusion of the stranger substitute. If, however, the conveyance being granted, and a child thereafter born to him, the granter should survive the birth of his child a considerable time without revoking this conveyance, or executing a new one, the presumption will not hold; and in any case the presumption may be redargued by proof. The presumption in favour of the child is always stronger where the conveyance is not merely a partial conveyance of the estate, but a universal settlement.

Si sit incompos mentis, fatuus et naturaliter idiota.—If he is of unsound mind, fatuous, and naturally an idiot. This is the enquiry which the jury have to answer from the evidence laid before them under a brieve of idiotry. Ersk., B. 1, T. 7, § 50.

Si sit incompos mentis, prodigus, et furiosus, viz., qui nec tempus nec modum impensarum habet, sed bona dilacerando profundit.—If he is of unsound mind, wasteful, and furious (*i. e.*, mad), viz., one who has no regard to the seasonableness or measure of his expenditure, but squanders his estate foolishly. This is the enquiry addressed to the jury in a brieve of furiosity. See Ersk., *ut supra.*

Si sit legitimæ ætatis.—If he is of lawful age. Ersk. *ut supra.*

Sibi imputet.—Let it be imputed to himself. In treating of the liability of cautioners Erskine uses this phrase in reference to the cases where, and as the reason why, the cautioner still remains bound, although the principal debtor may go free of his obligation: "Thus, a cautioner in an obligation, where the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his cura-

tors, is properly obliged, though the debtor himself should get free, by pleading the statutory nullity, or his own legal incapacity. The reason of this is obvious: *sibi imputet* (*i. e.*, let it be imputed to himself as the consequence of his own act—let him blame himself), who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he the cautioner, shall make good the debt." B. 3, T. 3, § 64.

Sibi invigilare.—To watch for themselves; to be careful of their own interests. Stair, B. 3, T. 3, § 20.

Sic utere tuo ut alienum non lædas.—So use your own property as not to injure that of another. This maxim of the civil law contains the only restriction laid upon the otherwise unlimited right which a proprietor has of using his property according to his own pleasure. Even where the use to which a proprietor puts his subject is injurious to that of his neighbour, yet, if it be for his advantage, and not merely a wanton or malicious act intended to injure, such use cannot be interfered with, for *utitur suo jure*. But, on the other hand, an act of a proprietor done in *in æmulationem vicini*, may be interdicted.

Silva cædua.—This is the name given "to a wood, which, on being cut, stoles out again for another cutting, so as, by proper management, to yield a yearly profit." (Bell's Dict., *v. Sylva.*) A liferenter, who has no right to cut down the timber on the estate liferented even where it has been planted by himself, is entitled to the *silva cædua*, because that is regarded as a part, not of the estate itself, but of its revenue or profits.

Simplex commendatio non obligat.—A mere recommendation does not bind, *i. e.*, does not infer an obligation Where goods are sold by sample, or without the buyer seeing any of the goods which he purchases, he is entitled to rely upon the statements of the seller as to their character and quality, and he will be entitled to repudiate the transaction or claim damages, if the seller's statements should be false, or calculated to deceive. But where the goods are inspected by the buyer, he has no such remedy; for, in that case his eye is his merchant, and he is bound to satisfy himself. In the latter case, the mere commendation of the seller, of the goods he is dis-

posing of infers no obligation or warrandice that they are what he represents them to be; and the buyer can only claim compensation, or resile from his contract, where the defect, subsequently discovered, was one in the knowledge of the seller at the time, and one which he, the buyer, could not have discovered from careful inspection. This maxim may also be taken as expressing one of the rules of law concerning guarantees. A mere letter of introduction, or one conceived in general terms, recommending a certain person as worthy of confidence, and to whom credit in mercantile transactions may be safely given, is regarded as a mere recommendation, not inferring any liability as against the person writing such a letter. But when it goes beyond this, and specifies a sum as the limit to which credit may be given, "or when it applies specially to a transaction, or dealing, or course of dealing, in which credit is necessary, and is accompanied by an assurance of safety, it will be held as a guarantee." Bell's Prin., § 280.

Simul et semel.—At one and the same time.

Sine animo remanendi.—Without the intention of remaining. Said of a person who has left the country temporarily, and intending to return; as exemplified in the case of a sailor entering upon a foreign voyage, but without the intention of remaining in the foreign country.

Sine animo revertendi.—Without the intention of returning. Said of a person who has left this country with the intention of settling in another.

Sine cura et cultura.—Without care and culture. Natural fruits, which grow without the care or culture of man, pass as pertinents of the land to the purchaser, although not mentioned in the conveyance; not so industrial fruits, which, being the result in some measure of artificial or human labour, require to be specially conveyed.

Sine decreto.—Without a decree. Ersk., B. 1, T. 7, § 17.

Sine fraude.—Without fraud; honestly; in good faith.

Sine pacto.—Without a bargain or agreement.

Sine quibus funus honeste duci non potest.—Without which the funeral cannot be decently conducted. All expenditure for such things as are necessary to the decent and becoming interment of a deceased person, are included under the term funeral charges or expenses, which form a preferable

claim upon the deceased's moveable estate. Such charges, of course, vary according to the rank and circumstances of the deceased.

Sine quo non.—Without whom nothing can be effectually done. In appointing trustees for carrying out the testamentary purposes of his settlement, a testator sometimes appoints one of his trustees to be a trustee *sine quo non*. The effect of this is that, if the trustee so named should die, or decline to accept, the nomination falls; without him there can be no trust. Where such trustee accepts the office, his concurrence is essentially necessary to every act of the trustees under the trust, so as to make it valid and effectual. But if the trustee is declared by the testator to be a *sine quo non* during his survivance, the effect is somewhat different; for while, in the event of his non-acceptance, the whole nomination falls, yet if he accept and afterwards die, the other trustees may validly fulfil the purposes of the trust. The same rules apply to the nomination of tutors or curators, and the like, where any one of the nominees is named *sine quo non*.

Sine vi aut dolo.—Without force or fraud.

Singuli in solidum.—Each for the whole. Where there are several co-obligants in one obligation, each bound in full performance, they are said to be liable *singuli in solidum;* and where each is liable only for his own proportion of the debt, they are said to be liable *pro rata*. See *In solidum. Pro rata.*

Societas.—The contract of society or partnership.

Socii.—Partners; associates.

Socius criminis.—An associate or accomplice in the commission of a crime. Complicity involves the same punishment as actual commission. A *socius* is a competent witness for the Crown; and the seemingly least guilty of the culprits is frequently taken in this character, where there is not sufficient evidence, without his testimony, to lead to a conviction.

Sola superviventia.—By mere survivance. There are some rights which require no legal process to confer them upon those who succeed to them, but which vest by mere survivance: such, for example, are the rights to titles of dignity descending to a son, a widow's *jus relictæ*, children's legitim, &c., which require neither service nor confirmation.

Solatium.—Compensation; indemnification. This word indicates the compensation given by the law for injury done to the feelings of any one; while *damages* generally signifies the compensation awarded for pecuniary loss sustained, or bodily injury inflicted. Thus, where a man has been killed, through the fault or negligence of another, the widow and children of the deceased are entitled, not only to damages on account of his death, and consequent removal of the pecuniary support he afforded, but also to *solatium* on account of their wounded feelings. *Solatium* was given, even where "the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit, on account of his bankruptcy and dissipated habits." *Brown*, 26 Feb. 1813.

Solertia.—Shrewdness; craftiness. See *Dolus*.

Solo animo.—By a mere act of the mind; by mere intention or design. The law takes no cognisance of that which is merely mental or intentional, until the design or intention finds expression in some overt act. Thus, the mere intention of acquiring a domicile does not constitute one unless the intention be followed by actual residence; nor does the intention to commit theft subject the person so intending to punishment, unless it be followed by the act of felonious appropriation.

Spe numerandæ pecuniæ.—In the hope or expectation of the money being paid. Where one grants an obligation in the expectation of being paid the money in return for which it is granted, but does not receive it, he may resist any action founded upon that obligation by the *exceptio non numeratæ pecuniæ*. So, also, where one delivers a conveyance which acknowledges receipt of the consideration price, and discharges the disponee, this does not exclude his action for the price, if the disponee on receiving delivery, refuses payment; the disponee is still liable *ex dolo*, the deed having been delivered *spe numerandæ pecuniæ*.

Species facti.—The particular character of the thing done. The peculiar circumstances attending any act or transaction are termed the *species facti*. Thus, in libelling a theft, the public prosecutor avers that the prisoner, on a certain day and at a specified place, feloniously appropriated a certain thing then in the lawful possession of a certain person; and that (where the crime is aggravated by housebreaking) he did so by

entering a house in a certain specified manner. Or in libelling a murder, he must aver the time, place, and manner in which the crime was perpetrated, as by assaulting the deceased with a lethal weapon, by administering a certain poison, &c. These constitute the *species facti* of the crime. Again, in a civil action for damages on account of slander, the pursuer must state the slanderous words used by the defender, as well as the place where, and the persons in presence of or to whom they were used. Such allegations constitute the *species facti* on which the action is founded.

Spes obligationis.—The hope or expectancy of an obligation yet to emerge. Conditional obligations are not prestable until the condition be purified; but though that should not happen during the creditor's life, the right under the obligation descends to his heir, who may claim performance after the condition has been purified. The heir, in such a case, succeeds to a *spes obligationis;* a *spes* because the condition may be purified, and only a *spes* because it may not.

Spes successionis.—The hope or expectancy of a succession. Any one who has a right to succeed to certain lands, either from his natural position or from the terms of a deed, but whose right, at same time, is one which may be defeated, is said to have a *spes successionis.* Thus, the eldest son of a landed proprietor has the hope of succeeding to his father's estate, and will succeed unless his expectation is defeated by his father's act; and so, also, a substitute called to a succession under a simple destination, has the hope or expectancy of succeeding, but merely the hope, since the institute may defeat it by altering the course of the succession. Such a *spes* may, by our law, form the subject of a sale; but it cannot be adjudged. See *Pactum corvinum,* &c.

Spoliatus ante omnia restituendus.—A man despoiled is to be restored to his possession first of all; a maxim importing that spuilzied goods must be restored before any discussion takes place as to who is the rightful owner of them. No one is entitled by violence to possess himself of that even which is his own, so long as it is in the lawful possession of another. Any one so dispossessed may recover the subject on proving that he was in the lawful possession of it, and the allegation of a preferable right on the part of the true

owner, although instantly verified, will not be received as a sufficient answer to the demand for restitution. In such an action the subject must *ante omnia* be restored to the person from whose possession it was violently taken, and the condition of parties being thus restored, they may have the question of their respective rights discussed and settled.

Spondeat superior.—Let the master answer or be responsible. See *Respondeat*, &c.

Spondet peritiam artis, et imperitia culpæ enumeratur.—He is responsible for skill in his profession, and want of such skill is regarded as a fault. Where one employs skilled labour, such as the services of a physician or lawyer, he is entitled to rely on the person so employed having and exercising ordinary skill; the person so employed professes to possess, and is responsible for such skill, and the want of it is regarded as a fault which subjects him in damages for whatever consequences may arise from his deficiency. See *Imperitia*, &c.

Sponsalia de futuro.—A promise or engagement to marry; betrothal. Such promises to enter into a marriage at a day still future, constitute no binding tie between the parties. Either may resile from the engagement, although, in the general case, the party doing so subjects himself in damages on account of breach of promise.

Sponsiones ludicræ.—Literally, obligations come under in jest; obligations by which the parties did not seriously intend to bind themselves. This name is given in our law to all obligations incurred by betting, gaming, etc., which are void at common law and sustain no action.

Sponte.—Spontaneously. Natural fruits are said to spring up *sponte*, in contradistinction to industrial fruits, which are the result of care and culture bestowed upon them.

Spreta authoritate judicis.—The authority of the judge being disregarded; in despite of the authority of the judge. Stair, B. 1, T. 9, § 21.

Spurii.—Bastards. The civil law distinguished between *naturales*, who were illegitimate children sprung from a marriage not considered lawful, or from concubinage as recognised by the law; and *spurii* (or *vulgo concepti*, as they are sometimes termed) who were the offspring of illicit intercourse. *Legitimi* were the children born of a lawful marriage.

Squalor carceris.—"This term means merely the strictness

of imprisonment which a creditor is entitled to enforce with the view of compelling the debtor to pay the debt, or disclose any funds which he may have concealed. It does not imply (as it did with the ancient churchmen, from whom the term is derived) anything loathsome or unhealthy in the imprisonment in Scotland, which is indeed less close than in England." Bell's Dict., *h. v.*

Squalor morbi.—The dregs of disease. Stair, B. 3, T. 4, § 28.

Stante matrimonio.—The marriage being still extant; during the subsistence of the marriage. The personal obligations entered into by a married woman during the subsistence of the marriage are not binding upon herself, nor can she be subjected to personal diligence thereon during that period.

Status.—Position; condition; rank. By the subsequent marriage of its parents, an illegitimate child acquires the *status* of legitimacy.

Stillicidium.—Stillicide; being that servitude by which a servient owner is obliged to receive on his property the eaves-drop which falls from the dominant owner's house. When the water does not fall in scattered drops, but is collected on the house in a spout and so discharged upon the servient tenement, the servitude is called *flumen.*

Stilus curiæ.—The form of court; a matter of legal form and not essential. Stair, B. 3, T. 3, § 22.

Stipulatio.—Stipulation, the mode by which, under the civil law, a verbal obligation was constituted. It consisted of a question by which one of the contracting parties (called the stipulator) asked the other whether he would promise to give or do something, and of the answer of the other party (who was called the promissor) that he did so promise. The following example of a stipulation will illustrate this:—*Quinque aureos dare spondes?* (Do you engage to give me five *aurei?*) *Spondeo* (I engage). Such question and answer completed the obligation, and bound the promissor in payment or performance. Previous to the reign of Leo, certain words required to be used, than which none other would bind the parties; but a constitution enacted by him (A.D. 469) rendered the use of these special words as a solemnity unnecessary. Thereafter a stipulation might be entered into in any words, if they clearly expressed the intention of the parties, but it was still

required that they should retain the form of a direct question and answer. An action arising out of an obligation so constituted was said to arise *ex stipulatu.*

Stipulatio sponsalitia.—The stipulation of betrothal; being the manner in which, under the civil law, espousals were entered into. This stipulation was entered into by the future husband on the one part, and the person who gave the woman in marriage on the other part; but it appears to have belonged to the older law of Rome. At a later period the *sponsalia* seem to have been merely an interchange of consent between the future spouses.

Stricti juris.—According to strict right. Some rights with which the law has to deal are regarded strictly, and the exercise of them limited to that alone which the express terms of their constitution warrants. Such rights, for example, as servitudes, monopolies, &c., are regarded *stricti juris*, because they are restrictions upon the free exercise of the rights of property, or on public commerce; they are limited to the express terms of the grant or deed which constitutes them, and no extension of the right or its exercise can be inferred or implied. The express words of the constitution, strictly interpreted, afford the criterion according to which the extent of the right is to be judged. Warrandice is also regarded strictly, and nothing is covered by the warranty beyond that which it clearly expresses.

Strictissimi interpretationis.—According to the strictest possible interpretation; according to the most literal rendering. All statutes imposing penalties, conferring personal privileges, restraining natural liberty, prescribing solemnities, &c., are so interpreted.

Strictissimi juris.—A phrase, more emphatic, but of much the same meaning and application as *stricti juris;* it is most generally used, however, in the same sense as the preceding phrase.

Sua potestas.—That natural power which a man has over his own person. A man is said to be *suæ potestatis* when it is meant that he enjoys freedom from any restraint.

Sub colore officii.—Under colour of a certain office; or under pretence of an official proceeding. "The Ecclesiastical Courts appear to have exclusive jurisdiction in sacred matters,

subject to the control and correction of the Court of Session when, *sub colore officii*, they violate the law of the land." Ersk. Prin. 69.

Sub cura mariti.—Under the care or curatory of the husband. So long as a wife is under her husband's care or power all personal obligations entered into by her without his consent are void.

Sub modo.—Under condition or restriction. A conveyance in trust is one *sub modo*, because it conveys, not for the purpose of vesting the subject conveyed in the disponee merely, but to vest him in order that he may fulfil certain purposes and perform certain duties. He is therefore vested under restriction of the uses to which he may apply the subject conveyed.

Subfeudum.—A sub-feu, *i.e.*, a feu held of and under one who himself holds, in the character of vassal, the lands he sub-feus.

Subreptione vel obreptione.—By concealing the truth or affirming a falsehood. Ersk., B. 2, T. 5, § 86.

Subsequente copula.—Carnal intercourse having followed; with subsequent carnal intercourse. A mere promise or engagement to marry at a future period does not constitute marriage, because the parties by delaying the marriage, are supposed not to have given that final and determinate consent which is necessary to its constitution. But where such promise or engagement is followed by carnal intercourse, the law presumes the final consent to have been given at the time of the connexion, and that the marriage was then consummated. Such a marriage is said technically to have been contracted by promise *subsequente copula*. See the case of *Monteith*, 5 March 1844, where all the previous cases upon this point of law were reviewed. See *Consensus non*, &c.

Subsidiarie.—Subsidiarily. Proper cautioners are only bound in payment to the creditor of that debt which they have guaranteed, when the principal debtor has been discussed and his estate has proved insufficient to meet the claim. They are only bound *subsidiarie*, in aid of the principal debtor, when he is unable to satisfy the demand of his creditor. Cautioners had at one time the benefit of discussion *de jure*, but this was abolished by the Mercantile Amendment Act, which provided

that, to entitle cautioners to such benefit, they must specially stipulate for it in their bond of caution.

Substitutio exemplaris.—This was the mode in which, under the civil law, heirs could be appointed to a minor who was insane. It was competent to any ascendant of the minor, maternal or paternal, to appoint, by an instrument, who should succeed to the minor's estate in the event of his dying without recovering his reason. The heir appointed, however, required to be one of the minor's descendants if he had any, if he had none then one of his brothers, and failing brothers, the choice of the testator (or person appointing) was unrestrained. This form of substitution was introduced by Justinian, whose constitution will be found in the Code L. 6, T. 26, l. 9; and is referred to in the Institutes, B. 2, T. 16, § 1. See also Stair, B. 3, T. 8, § 19.

Successor titulo lucrativo post contractum debitum.—A successor under a lucrative (gratuitous) title after debt has been contracted. An heir who succeeds to his ancestor's estate is liable for that ancestor's obligations; but this liability might be elided, if there were no legal provision to the contrary, by the heir receiving, during his ancestor's life, the whole estate in gift. To prevent this, the law provides that any heir receiving gratuitously, during his ancestor's life, that to which he would have been heir *alioqui successurus*, shall be liable for the debts due by his ancestor as at the date of the gift. The acceptance of such gift renders the heir liable under the passive title known as the *præceptio hereditatis*. Where the heir acquires the estate by *bona fide* purchase from the ancestor, no liability attaches to him for his ancestor's debts; the liability only arises where the estate has been transferred gratuitously.

Sui juris.—Persons who are independent of the control of others as regards their legal acts, and who can validly contract, and bind themselves by legal obligation without the consent of another, are called *sui juris;* that is, they can contract, &c., as of their own right. See *Alieni juris.*

Summum jus, summa injuria.—Extreme right is extreme injury; a maxim appealed to when it is contended that the complete enforcement of a right cannot be granted to one party without inflicting upon the other some wrong from

which the law is bound to protect him; an equitable restraint on the strict fulfilment of a legal obligation.

Suo nomine—In one's own name. See *Proprio nomine.*

Suo periculo—At one's own risk. See *Periculo petentis.*

Super aliquam partem fundi.—Upon any part of the land. In lands erected into a barony, sasine given under the old form, upon any part of the lands, was sufficient to vest the disponee feudally in the whole, except in the case where the charter or a clause of union specified a particular place as that at which sasine was to be given. In such case sasine required to be given at the appointed place, otherwise only the portions contiguous to that where sasine was actually given, and held of the same superior, were carried by the infeftment.

Super attentatis aut innovatis lite dependente. — Concerning those things attempted to be done, or alterations made, during the dependence of the suit. Stair, B. 4, T. 3, § 25. See *Pendente lite, &c.*

Super eisdem deductis. — Upon the same grounds or arguments. Stair, B. 4, T. 52, § 43.

Super jure naturæ alendi liberos.—On the ground of the natural law which obliges parents to aliment and support their children. Upon this ground parents are liable not only to aliment their children, but also for necessaries which have been supplied to the children by others. It lies on the furnisher of the goods, however, to show that they were necessaries.

Superflua non nocent.—Superfluities do not injure. Any verbiage in a deed which is merely superfluous does not render the deed less effectual than it would otherwise have been; it is held *pro non scripto*, and disregarded in the interpretation of the deed. The following passage from Ersk., B. 2, T. 3, § 21, contains an illustration of this maxim: "Charters begin with the name and designation of the granter, who is the proprietor of the lands disponed. Where there is an uncertainty in whom the property is vested, the grantee may desire that, for his security, every one who has a claim to the subject may concur in granting this deed; for though the right can be transmitted only by the true proprietor, yet the concurrence of another who is supposed to have also a

title to it, is, without vitiating the charter, held as superfluous."

Supersedere.—A sist. When creditors voluntarily agree to supersede or sist diligence against their debtor for a certain period, such an agreement is called a *supersedere;* and the same name is given to any judicial act by which creditors are restrained from doing diligence. A creditor who commits a breach of the *supersedere*, whether it be voluntary or judicial, is liable to the debtor in damages.

Supplendo vices.—By supplying the place; or, by coming in place of.

Suppressio veri.—The suppression or concealment of the truth. See *Expressio falsi.*

Surrogatum.—A thing which comes in place of another; a thing substituted for another.

Surrogatum sapit naturam surrogati.—A thing substituted partakes of the nature or character of that for which it was substituted. An illustration of this maxim will be found in Stair, B. 2, T. 2, § 14.

Suum cuique tribuere.—To give to every one that which is his own. See *Alterum*, &c.

Sylva cædua.—Wood that can be cut without injury. See *Silva*, &c.

T

Tacere per quadriennium utile.—To be silent throughout the four years after majority. During the four years succeeding his attaining majority, any one may reduce a deed granted by him to his lesion in the course of his minority, but if the four years be allowed to elapse, no challenge of the deed upon that ground can be effectually maintained. It is then held *presumptione juris et de jure* that the deed was not to his lesion, and such presumption cannot be traversed by the clearest proof. If the deed has been granted in pupillarity, it does not require to be challenged during the *quadriennium* or at any other period; it is null from the beginning, because a pupil is incapable of contracting or binding himself.

Talis qualis.—Such as it is. Where, in the purchase of heritable property, the purchaser agrees to accept of the seller's title as it stands at the time of the sale, without requiring any farther title or remedy of real or supposed defects, he agrees to take it *talis qualis*—such as it is without challenge.

Tam facti quam animi.—In deed as well as in intention. Both intention, and the act proceeding upon that intention, are necessary to every act which can be regarded as effectual in law. Thus mere residence is not sufficient in the general case to constitute domicile where such residence is merely temporary, and where there is no intention or design on the part of the resident to acquire a domicile; on the other hand, mere intention to acquire, without the residence indicative and in pursuance of that intention, will not constitute domicile. There must be *animus et factus*—the inten-

tion, and the overt act expressive of it. So also the mere taking possession of another's goods without felonious intent does not constitute the crime of theft, any more than does felonious intent without the act of appropriation; both are necessary to the constitution of the crime.

Tanquam bonus vir.—As an honest and honourable man. An agricultural tenant is bound to labour his farm "honestly and *tanquam bonus vir*, during the whole stipulated term" of his lease (Bell's Prin., § 1222); that is, he is bound to use his farm only for the purposes for which it was let, to grow such crops as will not waste or unduly impoverish the soil, and in every respect to take care of and cultivate the farm as if it were his own subject.

Tanquam dominus.—As owner; as in the character of proprietor.

Tanquam in libello.—As if alleged in the libel. Ersk., B. 2, T. 3, § 32.

Tanquam interim dominus.—As proprietor in the meantime; as the temporary owner.

Tanquam optimum maximum.—At its best and fullest; a right undiminished either in point of quality or in point of extent. Conveyance of an estate *tanquam optimum maximum*, implies that the right conveyed is one of full ownership throughout all the boundaries of the estate. Ersk., B. 2, T. 3, § 31.

Tanquam prescriptum quantum possessum.—There is only prescription in so far as there has been possession. The extent of a servitude constituted by grant, is regulated by the express terms of that grant although partial possession only may be given, so that the dominant owner may exercise his right to its full extent when he thinks fit. But a servitude acquired by prescription is limited to the use or possession which the acquirer had; his possession affords the criterion by which to judge of the measure of his right. The same rule applies where one acquires by possession a piece of ground lying contiguous to his property, as a pertinent to his lands: his prescriptive right only covers that which he has possessed as a pertinent.

Tanquam quilibet.—As an individual; like any other person. "The sovereign, when he grants a charter, not in

consideration of the granter's services, as sovereign *jure coronæ*, but *tanquam quilibet*, for a just price, must be liable to the common rules" regarding warrandice. Ersk., B. 2, T. 3, § 27.

Tantum et tale.—So much and of such a kind; both as regards quality and extent. See *Tanquam optimum*, &c.

Temere jurantes super assisam.—Persons swearing rashly upon an assize; jurors returning a verdict rashly, inconsiderately. Stair, B. 3, T. 5, § 43.

Tempestive.—Timeously; at the proper time.

Tempus continuum.—Time running on without interruption, whether it be time in which a legal right may be exercised or not. See *Tempus utile*.

Tempus deliberandi.—Time for deliberation; that period, formerly a year but now restricted to six months, which an heir has after a succession has opened up to him, to deliberate as to whether he will take up or renounce such succession. See *Annus*, &c.

Tempus utile.—Time which can be used; a time which is available for exercising legal privileges or rights; and so differing from *tempus continuum*, which is time running on continuously, whether available for such a purpose or not. See observations on *Anni continui* and *Anni utiles*.

Tenendas.—That clause in a charter which sets forth the nature of the tenure by which the lands are held; as, for example, whether it be feu, blench, burgage, &c. The name is taken from the first word in the clause, as it stood in the old Latin form.

Termini habiles.—Sufficient grounds or reasons to found some opinion, or to warrant certain procedure.

Termini sanctorum.—The limits or precincts of a sanctuary. Among the Romans, churches and altars dedicated to the gods afforded protection to those who had been guilty of the smaller delinquencies, but not to those chargeable with the grosser crimes of murder, &c. In Scotland we have no sanctuary affording protection to those guilty of anything which may be punished as a crime, but the sanctuary of Holyrood affords protection against personal diligence on account of civil debt. The debtor has only protection, however, so long as he remains within its limits, for he may be

apprehended if he goes beyond them, except it be on Sunday, on which day no civil process or diligence can be executed.

Terminus a quo.—Literally, the point from which. An example of the use of this phrase will be found in the following passage, where, treating upon the summary diligence which may proceed upon a bill, Bell says: "The protest must he registered in the books of a competent court within six months from the date of the bill, in case of non-acceptance; or six months from the date of payment, in case of non-payment; and it would seem that in a case where protest has been taken at once for non-acceptance and non-payment, the day of payment will be the *terminus a quo* in reckoning the six months." Bell's Prin., § 344.

Terminus ad quem.—The point to which; that point at which a calculation ends; or that point or conclusion to which an argument tends.

Tertia.—A third; the widow's terce.

Tertia rationabilis.—A reasonable third; used in reference to the widow's terce by Stair, B. 2, T. 6, § 17.

Tertium quid.—A third thing having a character and qualities distinct from those of either of its two component parts. Thus, where by the confusion of liquids or commixture of solids, the subject produced is of a character different from that of either of its component parts, it is called a *tertium quid.*

Testamenti factio.—The power of testing or of making a *mortis causa* settlement. Among the Romans this phrase included not only the power of testing, in regard to one's own property, but also of taking any benefit under the testament of another. See *Factio testamenti.*

Testatio mentis.—The expression of a testator's will or mind; a testament.

Testimonia ponderanda sunt, non numeranda.—Testimonies are to be weighed, not numbered. This rule imports, that more regard is to be paid to the character of the evidence adduced in support of a case than to the number merely of the witnesses who give it; for the evidence of two respectable and credible witnesses is of more value than that of a dozen witnesses of notoriously abandoned and profligate character.

Tigni immittendi.—One of the urban servitudes of the civil law, under which the dominant owner was entitled to insert a beam into the wall of the servient tenement for the purpose of supporting his own.

Titius hæres esto.—Let Titius be my heir. This was the form under the civil law by which, in his testament, the testator appointed his heir. The nomination of an heir was the great essential of a testament under the civil law; wanting this there could be no valid testament.

Titulo lucrativo, qui titulus est post contractum debitum.—By a lucrative (*i. e.*, gratuitous) title, which title is subsequent to the contraction of the debt. See *Successor*, &c.

Titulo singulari.—By a singular title. Any one acquiring heritage by purchase, gift, donation, &c., or in any other way than by succession, is said to hold or acquire under a singular title; persons so acquiring are called singular successors. See *Per venditionis*, &c.

Titulo universali.—By a universal title. An heir who succeeds to the estate of his ancestor is said to acquire or hold such succession by a universal title.

Titulus transferendi dominii.—The will or intention of conveying property; the *modus transferendi* being the overt act by which that intention is carried out and the real right transferred. See *Causa et modus*, &c.

Toties quoties.—As often as; for each time.

Toto genere.—In their whole character; in every respect; entirely.

Tractus futuri temporis.—A tract of future time. "Rights which have a *tractus futuri temporis* are also heritable. These are rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without relation to any capital sum or stock; *ex. gr.*, a yearly annuity or premium for a certain term of years." Ersk. B. 2, T. 2, § 6.

Traditionibus et usucapionibus, non nudis pactis, transferuntur rerum dominia.—Rights of property are transferred by delivery, and by prescription founded on lengthened possession, not by a mere agreement or paction. A paction was regarded as *nudum* under the civil law, where it was not

binding, in respect either that the parties had not finally agreed upon the matter, or that it had not been entered into with the usual and necessary solemnities. Such pactions transferred no right in that which formed the subject of the paction; real rights could only be transferred or conveyed by actual delivery or lengthened possession of the subject itself. With us, a mere agreement to sell or deliver may constitute a *jus ad rem*, but does not confer a real right or *jus in re*.

Trado tibi ecclesiam.—I deliver this church or living to you. The form of words sometimes used by a patron in presenting an incumbent to a vacant cure.

Transeunt cum universitate.—They transmit with the whole estate. When an estate is transmitted in its entirety its burdens transmit along with it, and the person who succeeds to the one underlies an obligation for the other. Thus a husband who, by the marriage, is vested with the wife's moveable estate, is also thereby rendered responsible for her debts; and an heir who succeeds universally to his ancestor, is liable for the whole of his ancestor's debts and obligations; they transmit with the whole estate.

Triennalis pacificus possessor beneficii est inde securu —The undisturbed possessor of a benefice for three years is thereafter secure from challenge. "This rule gives not right to the church, but prefers one churchman to another, if he continue to possess three years, without interruption, though he could not defend himself by his right." Stair, B. 2, T. 1, § 25.

Tutor datur personæ.—A tutor is appointed to the person; *i. e.*, to take care of the person of his ward; and in this respect differs from a curator who is (*datur rei*) appointed to take care of and preserve the ward's estate.

Tutor presumitur intus habere, ante redditas rationes —A tutor is presumed to have funds in his own hands until his accounts have been rendered; *i. e.*, he is presumed, before the rendering of his accounts, to have as much of the property of the ward in his own hands as will extinguish any claim he may have against the ward, until this presumption is redargued by his showing on reckoning with the ward that it is not so. See *Intus habet.*

Tutor rem pupilli emere non potest.—A tutor cannot purchase the estate, or that which is the property of the pupil his ward. Erskine (B. 1, T. 7, § 19) states, as an exception to this general rule, that a tutor may purchase the estate of his ward if it be exposed for sale by public auction; and the principle on which such an exception proceeds is obvious. In a private purchase of his ward's estate the tutor might exercise his influence over the ward, to his own advantage and to the lesion of the pupil; but in a public sale, where any one may compete for the subject exposed, there is no room for such private influence.

Tutores ad lites.—Persons appointed by the Court to protect the interest of pupils in actions to which they are called as parties. A person appointed to protect the interest of a minor, a married woman, or other person above pupillarity but not considered capable of protecting their own interest in a suit, is called a *curator ad litem.*

Tutores testamentarii, legitimi, et dativi.—Testamentary tutors, tutors-at-law, and tutors-dative. Testamentary tutors are those appointed by a father in his will to the guardianship of his pupil children; tutors-at-law are those who have the office of tutor by force of legal rule on account of their relationship to a pupil, such as a paternal uncle; and tutors-dative are those appointed by the Court on an application for their appointment.

Tutorio nomine.—In the name or character of tutor.

Tutus accessus non fuit.—There was no safe access. Stair, B. 2, T. 12, § 26.

Typographum.—Impressed by means of a die or type, as distinguished from *chirographum*—written with the hand. Stair, B. 4, T. 42, § 3.

U

Uberrima fides.—Good faith of the most full and copious character; a phrase similar in meaning, but more emphatic than *optima fides.*

Ubi aberat animus fœnerandi.—Where the intention of taking a usurious interest was wanting, Usury is the taking or stipulating for a higher than legal interest in return for the loan of money. Formerly, a contract which stipulated for usurious interest was null, and the lender stipulating for it was liable in certain penalties; this liability, however, was not incurred where the lender had no intention of exacting usury, for here, as in other offences, the *animus* was essential to the commission of the offence. All the usury laws have been repealed by the Act 17 and 18 Vic. cap. 90, and any rate of interest is now regarded as legal, and may be exacted, if the parties to the loan have agreed upon it; where there has been no agreement specifying the rate of interest, the legal interest, five per cent. is presumed to be the return due for the loan. Even under the old law a greater than the fixed legal rate of interest could be validly stipulated for where the risk was unusually great, as in bottomry and respondentia.

Ubi defunctus habuit domicilium.—Where the deceased had his domicile. Executors-dative must be confirmed in that county where the deceased had his domicile, and if domiciled furth of Scotland but possessed of moveable estate here, the confirmation must be taken before the Commissary at Edinburgh. The place of the deceased's domicile is of importance in a question relating to the succession duties payable on

personalty; for if the deceased had his domicile in Great Britain, the duty is exigible although the whole of his moveable estate should be situated abroad, while, on the other hand, if the deceased had his domicile furth of the kingdom, no duty is exigible, even where the whole of his moveable estate is situated within it.

Ubi dies cessit, licet nondum venerit.—In the case where the time has arrived at which money has commenced to be due, although that time has not arrived at which it may be exacted. Money may frequently be due and yet not be prestable; as, for example, where a legacy is bequeathed to one still in minority, and made payable on his attaining majority; the legacy in such case becomes due to him on the death of the testator, but payment cannot be demanded until the arrival of the time fixed by the testator as the date of payment; so also rent becomes due from the date of entry, but is not prestable until the arrival of the stipulated term. See *Dies cedit*, &c.

Ubi dolus dedit causam contractui.—Where fraud gave rise to the contract. Where a contract is founded upon fraud, or where one of the parties has been induced to enter into a contract upon the misrepresentations or falsehood of the other, it may be reduced upon that ground. The distinction, however, between *dolus* and *solertia* must be regarded, for the latter will not vitiate the contract which it has induced. See *Dolus*.

Ubi id non agebatur.—Where that was not done. See *Id non*, &c.

Ubi lex deest, prætor supplet.—Where the law is wanting or deficient, the prætor supplies the deficiency. All the prætorian remedies of the civil law proceeded upon this rule. Where the strict law would have condemned the promissor in a stipulation, and could afford him no relief from his obligation, even where he had been defrauded, the prætor supplied this want in the strict law and gave an *exceptio*, which was given effect to if substantiated. The strict law took no account of equity, but this was supplied by the prætor; and his equitable jurisdiction was somewhat similar to that power vested in the judges of our Supreme Courts, known as the *nobile officium*.

Ultimo loco.—In the last place. The claimant in a multiplepoinding who is preferred *ultimo loco*, can only take that which remains of the fund *in medio*, after all the other claimants have been satisfied.

Ultimus hæres.—Last heir. The sovereign succeeds as last heir, both in heritage and moveables, to every subject dying intestate and without lawful heirs entitled to take up the succession. Where heritage so devolving upon the sovereign is held of a subject superior, it is necessary to interpose a donatory, because the sovereign cannot hold of a subject. As the sovereign or his donatory succeeds in the character of heir, a deed executed by the deceased on deathbed in prejudice of the rights of the Crown, may be reduced *ex capite lecti*. When there are relatives of the deceased existing, but who cannot succeed according to the legal rules regulating intestate succession, it is usual for the Crown, on application made, to confer the estate upon them. The Crown, or Crown's donatory, is liable for the debts and obligations of the deceased to the extent of the value of the estate, but no further.

Ultra fines mandati.—Beyond the limits of the mandate. As a mandatory's authority arises entirely from the mandate, so the limit of that authority is prescribed by its terms. Anything, therefore, which a mandatory does in excess of the power conferred upon him, being unauthorised is not binding upon the mandant. But where a general mandate or factory is granted, all acts falling within, or usually understood to fall within such a mandate, are binding upon the mandant as in a question with third parties, even although they have been excepted from the general authority, leaving the mandant his relief as against the mandatory for the consequences of such acts. Thus, a tenant is entitled to pay his rent to his landlord's factor, and the receipt of the latter will be binding upon the landlord, even if the power of uplifting and discharging rents has been excepted in the factory granted, because such a power is presumed to be a part of the factor's authority. It will be different if the landlord specially intimates to the tenant that such power has not been conferred.

Ultra petita.—Beyond that which was sought. A judgment or decision is said to be *ultra petita* when it awards

more than was sought or sued for in the petition or summons; and the same thing is said of a sentence when it is not conform to its grounds and warrants. This affords a good ground for the reversal or reduction of such a decree.

Ultra valorem.—Beyond the value.

Ultra vires.—Beyond the power; in excess of the authority. An act performed by a mandatory not authorised by the mandate in his favour, is said to be *ultra vires* of the mandatory; and it is *ultra vires* of the Court to alter a final decision which it has pronounced.

Ultra vires compromissi.—Beyond the force or import of the submission; beyond the authority conferred by the submission. Arbiters are limited in their acts and in their power by the terms of the submission under which they are appointed, and if in their proceedings or decree-arbitral they go *ultra vires compromissi, i. e.*, if they decide any point not referred, or give an award of greater amount than the submission warrants, such decision or award may be reduced upon that ground. Where that part of the decision which is in excess of the power conferred upon the arbiters can be separated from the rest, the decision will only be reduced *quoad excessum;* but when this cannot be done, the decision will be reduced entirely. The leading cases upon this point will be found collected in Menzies' Lectures, 399.

Ultra vires inventarii.—Beyond the extent in value of the inventory; or beyond the value of the estate given up in the inventory. "The executor is, in the judgment of law, a trustee, appointed either by the deceased or by the judge, for executing the testament, and therefore is not subjected to the debts of the deceased *ultra vires inventarii*, beyond the value of the inventory." Ersk., B. 3, T. 9, § 41.

Una cum multuris omnium terrarum intra parochiam.—Together with the multures of the whole lands within the parish. Stair, B. 2, T. 7, § 19.

Unaquæque gleba servit.—Every part of the land is subject to the servitude. Where a servitude exists over a certain subject, every clod of the earth composing it (according to this rule) is affected by it. The servient proprietor, therefore, cannot alter or interfere with any portion of the subject, however small, if such alteration will affect or interfere with

the dominant owner's right. Yet, as servitudes are limitations of the rights of property, they must be used in the way least burdensome to the servient tenement, and any attempt to use them *in æmulationem* will be prevented.

Unde vi.—One of the prætorian interdicts under the civil law, and deriving its name from the introductory words of the *formula* appropriate to it. The prætorian interdicts were divided into three classes, according to the nature of the object to be attained by them; they were granted either for acquiring, retaining, or recovering possession of a subject. Of the first class, the interdict *quorum bonorum* may be taken as an example; of the second, the interdict *uti possidetis;* and of the third, *unde vi.* The interdict *unde vi* was that granted to any one who had been violently dispossessed of a subject, in order that he might recover its possession. To entitle him to this interdict, it was necessary that he should have been dispossessed by violence, and that he should have been in actual possession at the time of the violence being committed. It was no answer that the person committing the violence was the true owner, and that he who had actual possession was an intruder or unlawful possessor, because no one was entitled to vindicate his right by force. This interdict was at one time granted only where the subject sought to be recovered was immoveable, but at a later period its application was extended also to moveables.

Unico contextu.—In one connection; that is to say, by one and the same act; or by an act performed in connection with another, and at the same time. This may be best explained by an example of its use. When there are more parties than one to a deed, it is not essential to the validity of its execution that they should subscribe *unico contextu; i. e.*, it is not necessary for them to subscribe at the same time and place. But where notaries subscribe for a person who cannot write, it is necessary that they should subscribe *unico contextu* at the same time and place, and before the same witnesses.

Universitas.—Literally, the whole. The *universitas* of an estate, heritable or moveable, is that estate in its entirety, without limitation or deduction.

Universum jus.—The entire right. When an heir suc-

ceeds to the entire right of his ancestor, heritable and moveable, he is called a universal successor. This phrase is similar in import to the preceding one.

Unum quid.—One thing. This implies that several things are, for some purpose, taken and considered as one. Thus, heritage and moveables, separate and distinct rights in themselves, and regulated by different rules of law, may be so conveyed by a testator to trustees as to constitute his whole estate a *unum quid, i. e.,* one right which his trustees must deal with as one, and not as separate real and moveable rights

Unumquodque eodem modo dissolvitur quo colligatur.—Anything (that is, any obligation) is discharged in the same manner as that in which it was constituted. A verbal obligation may be verbally discharged; but an obligation requiring writing in its constitution, requires, in the general case, a written discharge. See *Nihil tam,* &c.

Usque ad sententiam.—Until the pronouncing of judgment. "Though an executor cannot, in the general case, sue the debtors of the deceased till he be confirmed, because it is the confirmation which gives him the *jus exigendi;* yet executors who are unwilling to be at the charge of confirming doubtful debts, may even, before confirmation, sue for payment, if they obtain a license from the Commissary for that purpose. These licenses are never granted, till he who applies for them has obtained a decree decerning himself executor. They are intended merely to save expense, where there is danger of getting nothing by the confirmation; and for that reason they do not include a power to the pursuer to insist for a decree against the debtor; they are only granted *usque ad sententiam.*" (Ersk., B. 3, T. 9, § 39.) Such a procedure as that here detailed, of suing upon the license of the Commissary before confirmation, is now very unusual, if not altogether unknown in practice.

Usucapio.—Uusucapion; a right under the civil law, similar to that conferred by the long prescription of our law. To found this right, it was necessary, according to the older law, that the party acquiring it should have been in the *bona fide* and unchallenged possession of the subject for one year, if it was a moveable, or two years if immoveable, and situated in Italy; the *dominium* of immoveables, situated in the pro-

vinces, could not be acquired by usucapion at all. But this was somewhat altered by Justinian, who enacted that, to acquire moveables by usucapion three years' possession should be necessary; and that immoveables, wherever situated (for he abolished the distinction previously existing between immoveables situated in Italy and in the provinces), should be acquired by "possession of long time;" that is, possession for ten years (*inter præsentes*) where the person acquiring and the person challenging his right resided in the same province, or for twenty years (*inter absentes*) where they resided in different provinces. See *Præscriptio longi*, &c.

Usura.—Interest; usury.

Usura manifesta.—Direct or manifest usury. A creditor was guilty of this when he stipulated for a higher than the legal rate of interest, or even when he took interest before it was due, although no higher than the legal rate, as, for example, when he accepted a year's interest before the year had expired. The punishment of usury was declared, by the Act 1597, cap. 251, to be escheat of moveables, the annulling of the usurious contract, and forfeiture of the principal sum lent and interest due upon it to the Crown or its donatory. All the usury laws have now been repealed. See *Ubi animus*, &c.

Usura velata.—Covert usury; as where a creditor stipulated for usurious interest, by adding it to the principal sum, and thus making it appear as a part of the original loan.

Usus.—Use. One of the civil law personal servitudes, which conferred upon the person entitled to it the right to use the subject, but to use it merely. He had the *nudus usus*, the bare use; and while he enjoyed any advantages which the use conferred, he could not avail himself of anything which the subject produced. Thus, where the subject over which the right was given was a dwelling-house, the *usuarius* was only entitled to use it personally, and could not, like a *usufructuarius* or liferenter, gain profit to himself by letting it to another. But where the subject was one of which the bare use would be of no benefit to the *usuarius*, the rigour of this principle was somewhat abated, and he was allowed to gather and enjoy certain of its fruits, but that only to a limited extent. He might take, for example, such fruits as were necessary for the subsistence of himself and family; if the sub-

ject of the servitude was a flock of cattle, he might take a moderate quantity of the milk, &c. The *usuarius* was the person entitled to the right of *usus*.

Ut sortiantur effectum.—That they may receive effect. "By the Roman law, if one bequeathed a subject which he knew did not belong to himself, the legacy had this effect,—that the heir must have either purchased it for the legatee, or paid its value to him if it could not be purchased; for all testamentary deeds ought to be so explained *ut sortiantur effectum;* and unless the legacy had been interpreted in this manner, it could have had no effect." Ersk., B. 3, T. 9, § 10.

Ut supra.—As above. A common mode of reference to a preceding passage.

Ut voluntas testatoris sortiatur effectum.—That the will of the testator may receive effect. On the death or declinature of the trustees appointed by a testator in his trust-settlement, the Court, on application to that effect, is in the practice of appointing a judicial factor, by whom the purposes of the testator may be carried into effect.

Uti mos est in feudifirmis.—As is the custom in feu-holdings. Ersk., B. 2, T. 5, § 48.

Uti possidetis.—One of the prætorian interdicts under the civil law, deriving its name from the introductory words of the *formula* appropriate to it. This interdict was one of that class which were given for the purpose of retaining or defending possession of the subject in dispute; and it was granted only where the possession was not vicious as in a question with the person claiming it. Possession was said to be vicious when obtained *vi aut clam aut precario*,—by force, or clandestine means, or by importunate entreaty. Possession so obtained could not be defended by the interdict *uti possidetis*. Natural possession was not required to found this interdict; it was sufficient if there was civil possession. See *Unde vi*.

Uti quisque rei suæ legassit, ita jus esto.—As any one disposes of his own property by testament, so let the law be. This was the rule of the Twelve Tables regarding the disposal of property by testament. Previous to this, the effect of any will not made before the *comitia curiata*, which was convoked twice a year for the purpose of making wills, was very uncertain: the rule of the Twelve Tables was intended to take

away this uncertainty, and to give effect to any will which was intelligible and clear. It has been maintained by some, that the Twelve Tables (by the provision now under explanation) first gave the right to a Roman citizen to dispose of his own property according to his pleasure; but this position does not seem to he well founded. The controversy on this point will be found treated of in Smith's Dict., *v. Testamentum*, and Sandars' Justinian, 256.

Utiliter et equivalenter.—Duly, and with equal effect. Stair, B. 3, T. 2, § 5.

Utitur jure auctoris.—He uses or exercises the right of his author. A disponee exercises the right of his author in the subject disponed; that is to say, he possesses all the rights *quoad* it which his author possessed, and is subject to all the objections or obligations concerning it to which his author was liable.

Utitur jure communi.—He uses the common law. Ersk., B. 2, T. 3, § 27.

Utitur jure privato.—He uses or exercises his own private right. This and the preceding phrase, which are similar in import, imply the rights which the Sovereign enjoys or uses as an individual in common with any of his subjects, as contradistinguished from those which are rights or privileges of the Crown, as to which *utitur jure coronæ*.

Utitur jure suo.—He uses or exercises his own right. The exercise of rights of property on the part of the proprietor so long as not exercised *in æmulationem*, cannot be interfered with, even where they are injurious in their effects to the adjoining property. In such case the proprietor is only doing that which he has a right to do, *utitur jure suo*.

V

Valere seipsum.—To be of its own value. In the retour of a special service it was formerly necessary to specify the value of the lands, in order that the right of the superior, under his casualties, might be ascertained; but "because annual rents arising out of lands had no distinct valuation or extent, therefore they were said, in the *valent* clause of the retour, *valere seipsum, i.e.*, the annual rent itself was accounted the retoured, and consequently the non-entry duty." (Ersk., B. 2, T. 5, § 38,) The *valent* clause in a retour was that which specified the value of the lands according to the old and new extent.

Vassalli ligii.—Vassals holding immediately of the crown. See *Ligia*, &c.

Vassallo et quibus dederit.—To the vassal and to whomsoever he shall have given it. In the earlier period of the feudal system, and after feudal grants had become the absolute property of the vassals, descending to their heirs and irrevocable on the part of the superior, there was still a restriction placed upon the vassal's power of conveying the subject of the grant to a singular successor. Unless with consent of the superior, he could not convey more than the half of the grant without incurring the casualty of recognition, which was a forfeiture of the whole fee; nor could a superior be compelled to receive as vassal one who had acquired right under a conveyance to which he, the superior, was not a consenter. If the original grant had been destined to the vassal "and his heirs and assignees whomsoever," this only bound the superior to receive the proper heirs of the vassal and not his assignee;

but if the destination bore to be to the vassal "*et quibus dederit*," this was construed as a consent on the part of the superior to alienation, and under which he was bound to receive, as vassal, his vassal's disponee. This distinction, at one time of much importance, was practically abolished by the Act 20 Geo. II., cap. 50, which introduced a mode by which either an heir or disponee could force an entry from the superior. Duff's Feud. Con., 62.

Vassallo faciendo superiori quod de jure facere oportet.—Upon the vassal performing that to the superior which, according to law, he ought to perform. Ersk., B. 3, T. 8, § 79. See *Faciendo domino*, &c.

Vel faciendo vel delinquendo.—Either by doing something or by leaving something undone; either by act or omission.

Venditio nominis.—The sale or conveyance of a debt. See *Liberatio nominis.*

Verba jactantia.—Empty, vain, bragging words; words not seriously spoken, nor with the intention of binding the person using them to their truth. If two persons declare themselves to be man and wife, and do so seriously before witnesses, such a declaration will constitute a valid and binding marriage; but when such declarations are made in jest, and amount to mere *verba jactantia*, they constitute no contract.

Verba solennia.—Solemn or formal words; words essential to validity. The word "dispone" was of this character before the passing of the Titles to Lands Act, and no conveyance of lands was effectual if this word was not used.

Verba sunt interpretanda contra proferentem.—Words are to be interpreted against the person using them. This is one of the rules observed in the interpretation of writs. Where the person using common words is vulgar and illiterate, they are interpreted according to the general acceptation of such words among people of the same class as himself; but if he uses technical words and formal expressions, they are construed according to their technical meaning and signification; the using of them raises the presumption of knowledge on his part of their meaning.

Verbatim et literatim.—Word for word, and letter for letter; an exact copy.

Verborum obligatio.—An obligation constituted *verbis;* a verbal obligation. This was one of the classes of contracts among the Romans, which included all contracts or obligations in the constitution of which certain solemn and formal words were necessarily used. For an example, see *Stipulatio;* see also *Obligatio*, &c.

Veredictum.—Verdict.

Vergens ad inopiam.—Approaching to want or insolvency. When a debtor is clearly *vergens ad inopiam*, a creditor may legally resort to certain measures for the purpose of protecting his interests which would not otherwise be competent to him. Thus, if the debtor be bound under a bill, the creditor may, in consideration of his debtor's circumstances, obtain a precept of arrestment on the bill before it becomes due, on which he may arrest any funds due to his debtor. As this proceeding is only allowed, however, as a protective measure on the part of the creditor, he cannot, by action of furthcoming or otherwise, render the arrested funds available to himself until the bill falls due. Heritable property may be adjudged under the same circumstances in security, but, being merely a security, it cannot by the lapse of any length of time become an irredeemable right. The fact of the debtor's being *vergens ad inopiam* will be inferred from different circumstances in different cases, and the proof of that fact will also, necessarily, be varied.

Veritas convicii.—The truth of the accusation. In actions for damages and solatium on account of libel, the *veritas convicii*, or truth of the alleged libel, is a defence competent to the defender, and may be proved by him if he has sufficiently averred it so as to entitle him to an issue upon that point. For the most part, such a defence is advanced in answer to implied malice on the part of the alleged libeller; but it is frequently used to palliate his conduct, and with the view of mitigating the damages to be found due. It is doubtful whether in any case the mere *veritas convicii*, even when proved, will wholly absolve the defender; and in cases where the defender's conduct has been clearly malicious, it will not even go to mitigate the damages.

Veritas convicii, an excusat.—Does the truth of a libel excuse its publication?

Versans in illicito.—Engaged in some unlawful occupation; performing an illegal act.

Vestita viro.—Clothed with a husband. A married woman is said to be *vestita viro*, and so long as this coverture exists her person cannot be attached on civil-diligence, unless that diligence proceeds upon a decree *ad factum præstandum*, for the performance of some act which she is bound to perform, and which cannot be validly performed except by herself, *ex gr.*, to enter the heir of her vassal, to produce or exhibit as a haver writings in her own custody, etc.

Vestitus et mundus muliebris.—A woman's wearing apparel and ornaments. These are all included in a wife's *paraphernalia*.

Vi aut clam aut precario.—By force, by stealth or other clandestine means, or by importunate entreaty. Possession of a subject obtained by any of these means was regarded in the civil law as vicious, and could not be defended by the prætorian interdict *uti possidetis;* the formula appropriate to that interdict expressly excepted from its benefit any possession so obtained.

Vi aut metu.—By force or fear. See *Ex vi*, &c.

Via.—One of the chief rural servitudes of the civil law, which entitled the dominant owner to a right of way through the servient owner's property. It included both *iter* and *actus*, so that the dominant owner had the right of passing either on foot or horseback, and also of driving a vehicle, cattle, or beasts of burden, along the servient tenement.

Via actionis.—By way of an action; by means of an action.

Via facti.—By means of an act; by personal act. "The course of both the positive and negative prescription may be broken off or interrupted by a protestation taken against the possessor, that his possession shall not hurt the right of him who protests. This is called, in common speech, *civil interruption*, because it is attended with no violence; and in our statutes it gets the name of an interruption *via facti;* because it is founded on the extrajudicial deed of him who interrupts." Ersk., B. 3, T. 7, § 40.

Via juris.—By means of law, or legal process. Interruption of prescription by judicial proceedings is called interruption *via juris;* while interruption by means of an extrajudicial act is said to be *via facti*.

Vice versa.—Conversely.

Vicecomes.—The ancient name of the sheriff.

Vicecomitatus.—A sheriffdom or shire.

Vicem fructuum obtinere.—To obtain or hold the place of fruits. This is said of interest, which is regarded as the fruit or produce of money. Interest is therefore a part of a life-renter's right, who is entitled to the whole produce of the estate liferented *salva substantia*. In respect of the character thus given to interest, Erskine says "that a *bona fide* possessor is as strongly entitled to retain interest as natural fruits;" but this seems not to be without doubt. See Ersk., B. 2, T. 1, § 26, with notes appended by Lord Ivory, and a previous editor.

Vide infra.—See below. Used by way of reference.

Vide supra.—See above. Used by way of reference.

Vidi scivi et audivi.—I saw, knew, and heard. These words formed part of the long doquet which the notary was formerly in use to append to an instrument of sasine; they imported that he was personally present on the ground when sasine was given, and that the facts attested in the instrument he knew to be true from his having seen and heard them done and said. These words were essential to the validity of the instrument, and their want has been held fatal. The long doquet was abolished, along with the ceremony of giving infeftment then in use, by the Act 8 and 9 Vic., cap. 35.

Vigilantibus non dormientibus jura subveniunt.—The laws help or assist those who are watchful of their rights, not those who are careless of them. On this maxim preference is given in competition to rights which have been first perfected, and to diligences which have been first used; those who have been most watchful of their rights, and careful to use the legal means for securing them, being best entitled to the benefits which the law confers or affords. Prescription is founded in part upon this principle; for rights are cut off by prescription as much *in pœnam* of the neglect of the creditor to enforce his claim as a presumption of abandonment or discharge. A creditor, therefore, who fails to claim or enforce his right for forty years loses that right altogether; and one who carelessly allows another, for forty years, to hold possession of his land, or to use part of it as a common passage or road, without interfering to protect his rights, must thereafter lose his right

to the land in the one case, and in the other submit to the servitude so acquired.

Vinculum personarum ab eodem stipite descendentium.—The bond uniting persons descended from the same stock. Bell's Prin., § 1647.

Vindicatio.—The name given in the civil law to a real action, as opposed to *condictio*, a personal action. It was competent only to the real owner for recovery of the thing claimed itself, and only competent to him as against the person then in actual possession. It applied alike to things corporeal and incorporeal, and therefore might be the form of action adopted for recovery of a slave, or of a right of usufruct or servitude. It is common for the Latin jurists to speak of a person being able to vindicate a thing as a mode of asserting that he is the owner, the test of ownership being, whether the supposed owner could or could not claim the subject by *vindicatio*. See *Condictio*.

Viri feroces.—Fierce, impetuous, and passionate men. Stair, B. 4, T. 40, § 25.

Vis aut metus qui cadit in constantem virum.—A force or fear sufficient to overcome a man of firmness and resolution. Force or fear, if libelled as a ground of reduction of a contract or obligation induced by such means, must be of the character described in this phrase to be effectual; but it is always a question of circumstances what amount of force, or what threats superinducing fear, amount to the description here given. It must, however, be a force or fear which the person subjected to it could not at the time, and in the peculiar circumstances, withstand; and the bodily and mental condition of the person influenced, the particular nature of the influence used, and the whole surrounding circumstances, are taken into view in considering whether the force or fear was or was not sufficient to overcome his will. See *Ex vi*, &c.

Vis major.—A greater or superior power. In reference to the subject treated of in the preceding phrase, *vis major* signifies actual personal violence; generally, however, it takes its literal signification.

Vitium reale.—A real defect. Where there is a real defect in the title to a subject, heritable or moveable, it affects all singular successors or subsequent possessors. It is inseparable

from the subject itself, and therefore the most perfect *bona fides* will not remedy the defect. See *Labes realis*, &c.

Viva voce.—Orally.

Voces signatæ.—Marked or formal words; words of style which are essential, and which cannot be supplied *per equipollens*. This phrase is similar in import to *Verba solennia*, which see.

Volenti non fit injuria.—To one consenting no wrong is done. The import of this maxim is, that that which, unauthorised, would amount to wrongous injury, subjecting the doer of it in damages to the person injured, loses this character, if the person suffering the disadvantage or injury consents to the performance of the act. Thus, it was supposed to inflict an injury upon a superior if his vassal disponed more than half of his lands, and in the event of his doing so the superior recovered the whole lands as forfeited under the casualty of recognition. But if the superior consented to the alienation of the vassal's lands, the casualty of recognition was not incurred, because no wrongous injury was supposed to arise to the superior from an act to which he was a willing and consenting party. To break down a neighbour's fence or wall, to build upon his land, or to do anything inflicting damage upon him, entitles him to reparation, because such acts are wrongous and illegal; but if his consent to the act has been obtained, this takes away that which was wrongous in it, and at same time takes away all claim for reparation on account of it. *Injuria* signifies, not only injury or damage, but injury or damage wrongously inflicted, and giving rise to a claim for reparation.

Voluntariæ jurisdictionis.—Of or pertaining to voluntary jurisdiction. See *Jurisdictio contentiosa*.

Voluntas testatoris.—The will or intention of a testator. In the interpretation of a will or settlement, the intention of the testator, as it can be gathered from the whole strain and purpose of the deed, is to be chiefly regarded. Where technical terms are used, however, they must bear their technical signification, and evidence that the testator did not understand them, or that his intention was different from that which they technically express, cannot be received.

Voluntatis non necessitatis.—A matter of choice, and not of necessity.

Votum captandæ mortis alienæ.—An earnest desire for the death of another. Under the civil law, any paction by an heir concerning his ancestor's estate during that ancestor's life, was ineffectual, and held as invalid; nor could an heir, during his ancestor's life, sell his *spes successionis.* Such transactions were regarded as *contra bonos mores,* as inducing, or likely to induce, an undue or improper desire for another's death. This rule does not prevail with us, for a *spes successionis* may form the subject of a valid sale. See *Pactum corvinum,* &c.

Vulgo quæsiti.—Bastards; frequently called in the civil law *vulgo concepti.* See *Spurii.*

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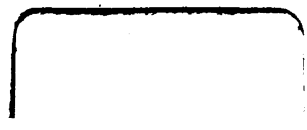
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